(19,310.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 235.

SAMUEL M. CLYATT

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States circuit court of appeals for the fifth circuit	1	1
Statement of the case	1	1
Indictment	1	1
Plea and verdict	2	2
Motion in arrest	3	2
Order overruling motion in arrest	3	3
Judgment	3	3
Assignment of errors	4	3
Questions certified	5	4
Clerk's certificate	7	4

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 6, 1904.

1 Filed March 29, 1904. Charles H. Lednum, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

SAMUEL M. CLYATT, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error. } No. 1151.

Error to the circuit court of the United States for the northern district of Florida.

Before Shelby, circuit judge, and Maxey and Jones, district judges.

Statement of the Case.

On November 21, 1901, at a term of the United States circuit court for the northern district of Florida, the grand jury of that court, duly sworn and organized, found and presented the following indictment:

"In the Circuit Court of the United States for the Northern District of Florida, in the Fifth Judicial Circuit.

"The grand jurors of the United States of America, empaneled and sworn within and for the district aforesaid, on their oaths present, that one, Samuel M. Clyatt, heretofore, to-wit: on the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did, then and there, unlawfully and knowingly return one, Will Gordon and one Mose Ridley to a condition of peonage by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley returning them the said Will Gordon and Mose Ridley to
work to and for Samuel M. Clyatt, D. T. Clyatt and H. H.
2 Tift, co-partners doing business under the firm name and style of Clyatt and Tift, to be held by them the said Clyatt & Tift to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"2nd. And the grand jurors aforesaid, on their oaths aforesaid, do further present, that one, Samuel M. Clyatt, heretofore, towit: on the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid and within the jurisdiction of this court, did, then and there, unlawfully and knowingly cause and

aid to be returned Will Gordon and Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and Mose Ridley, causing and aiding them the said Will Gordon and Mose Ridley to be returned to work to and for Samuel M. Clyatt, D. T. Clyatt and H. H. Tift, co-partners doing business under the firm name and style of Clyatt & Tift to work out a debt claimed to be due to them the said Clyatt & Tift by them, the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"JOHN EAGAN,
United States Attorney."

"Indorsements: A true bill, Edward B. Eppes, foreman."

The defendant, Samuel M. Clyatt, was brought to the bar, and after hearing the indictment read, pleaded "Not guilty." Whereupon, a jury was duly empaneled, and after hearing the evidence, argument of counsel and charges of the court, returned the following verdict: "We, the jury, find the defendant guilty, so say we all." Whereupon, the defendant Samuel M. Clyatt was remanded to jail to await the further order of the court.

After verdict, and before sentence, the defendant, by his attorneys, moved the court to arrest the judgment, and that he be dis-
3 charged and allowed to go without delay, on the following grounds:

"1st. That the statute under which this indictment is found, to-wit: section 1990 and 5526 of the Revised Statutes of the United States, do not apply to the charges made against this defendant in the indictment or to the evidence in support of the same.

"2nd. That there was no proof whatever of any peonage previous to, or subsequent to the finding of the indictment, on Mose Ridley or Will Gordon inflicted or caused to be inflicted by this defendant, supporting the offense of peonage as charged in this indictment.

"3rd. That the offense of peonage as defined in the statute and the punishment therefor as defined and provided in the sections 1990 and 5526 of the Revised Statutes of the United States, if constitutional, which is denied, was never made applicable to the fact stated and proven in the indictment and such offenses as were proven are cognizable only in the State courts, no Federal jurisdiction appears in this cause.

"4th. No system of peonage is charged or proven to have been in evidence within this jurisdiction.

"5th. The proof of an existing custom not charged in the indictment to exist in Levy county, Florida, or in any other locality, could not supply the absence of any proof as to the return of Gordon and Ridley to a condition of involuntary servitude."

After hearing the motion, the circuit court made the following

order: "The United States *vs.* Samuel M. Clyatt. Peonage. "The motion in arrest of judgment by the defendant is hereby overruled."

And, thereupon, on March 27, 1902, the circuit court entered the following judgment: "The United States *vs.* Samuel M. Clyatt. Indictment, violation section 5526 Rev. Statutes of U. S.

"And now at this time came the United States, by John Eagan, United States district attorney for the northern district of Florida, who prayed the judgment of the court upon one Samuel M.
4 Clyatt, heretofore convicted before this court of a violation of section 5526 of the Revised Statutes of the United States, and the said defendant being brought into court, and the court being fully advised in the premises, ordered the said defendant to the bar of the court and imposed the following sentence:

"It is ordered and adjudged that the said defendant, Samuel M. Clyatt be taken hence to the Federal penitentiary at Atlanta, in the State of Georgia, and there confined at hard labor for the full term and period of four years from the 27th day of March, A. D. 1902, and that he stand committed until the terms of this sentence be complied with, or until he be discharged by due course of law."

And afterwards, on March 27, 1902, defendant Samuel *R.* Clyatt by his attorney, duly applied for and obtained a writ of error to the United States circuit court of appeals for the fifth circuit, and made the following assignment of errors:

"Comes now the defendant, Samuel M. Clyatt, and makes the following assignment of errors:

"1. The court erred in overruling the motion of defendant for the arrest of the judgment in this cause upon the several grounds alleged therein.

* * * * * * *

"3. Sections 1990 and 5526 of the Revised Statutes of the United States, under which the defendant was tried and convicted, are not applicable to this case. There is no allegation or proof of the existence of any system of peonage anywhere in the States of Florida or Georgia.

"4. There is no allegation that any act, law resolution, orders, regulations or usages, which had been before established, maintained or enforced, is charged in the indictment or that by virtue of any of these an attempt has been made in this case to establish, maintain, and enforce, directly or indirectly, the voluntary or involuntary service or labor of any person as peons in liquidation of any debt or obligation, or otherwise, and there is no proof against
5 this defendant of having done so, or of having assisted in the arrest or return of Gordon and Ridley to any condition of peonage.

"5. The statutes were made and intended to be applied to a system in existence in the Territory of New Mexico and not extended to any State wherein the system then existing in New Mexico did not obtain."

Thereafter the circuit court made an order granting the defendant leave to file a supersedeas bond in said cause. The bond was duly filed and approved.

This cause having come on for hearing in this court, was argued by the attorneys for the plaintiff in error and by attorneys for the United States; whereupon, this court, desiring the instruction of the honorable Supreme Court of the United States for proper decision of the matters pending, certifies to said Supreme Court the following questions, to-wit:

1. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States?

2. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States when at the time of the arrest and return of such person, there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage.

3. Do the acts and conduct of the defendant as charged in the indictment constitute the offence of holding, arresting or returning to a condition of peonage within the purview of sec. 5526
6 of the Revised Statutes?

For further certainty and information a printed copy of the transcript is transmitted with this certificate.

7 United States Circuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA, *Fifth Judicial Circuit,* } ss:

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing statement of facts and certificate in the case of Samuel M. Clyatt, plaintiff in error, *versus* The United States, defendant in error, No. 1151 on the docket of said court was duly filed and entered of record in my office by order of said court, and as directed by said court, the certificate is by me forwarded to the Supreme Court of the United States for its action thereon;

And I further certify that accompanying this is a printed copy of the record in said case, which I have identified by endorsing thereon and signing officially as follows; to-wit: "Identified as a printed copy of the record in No. 1151, Samuel M. Clyatt *vs.* The United States."

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court, at the city of New Orleans, Louisiana, this April 1, 1904.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals
for the Fifth Circuit.

Endorsed on cover: (Certificate.) File No. 19,310. U. S. C. C. of appeals, 5th circuit. Term No. 235. Samuel M. Clyatt *vs.* The United States. Filed April 26th, 1904. File No. 19,310.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 235.

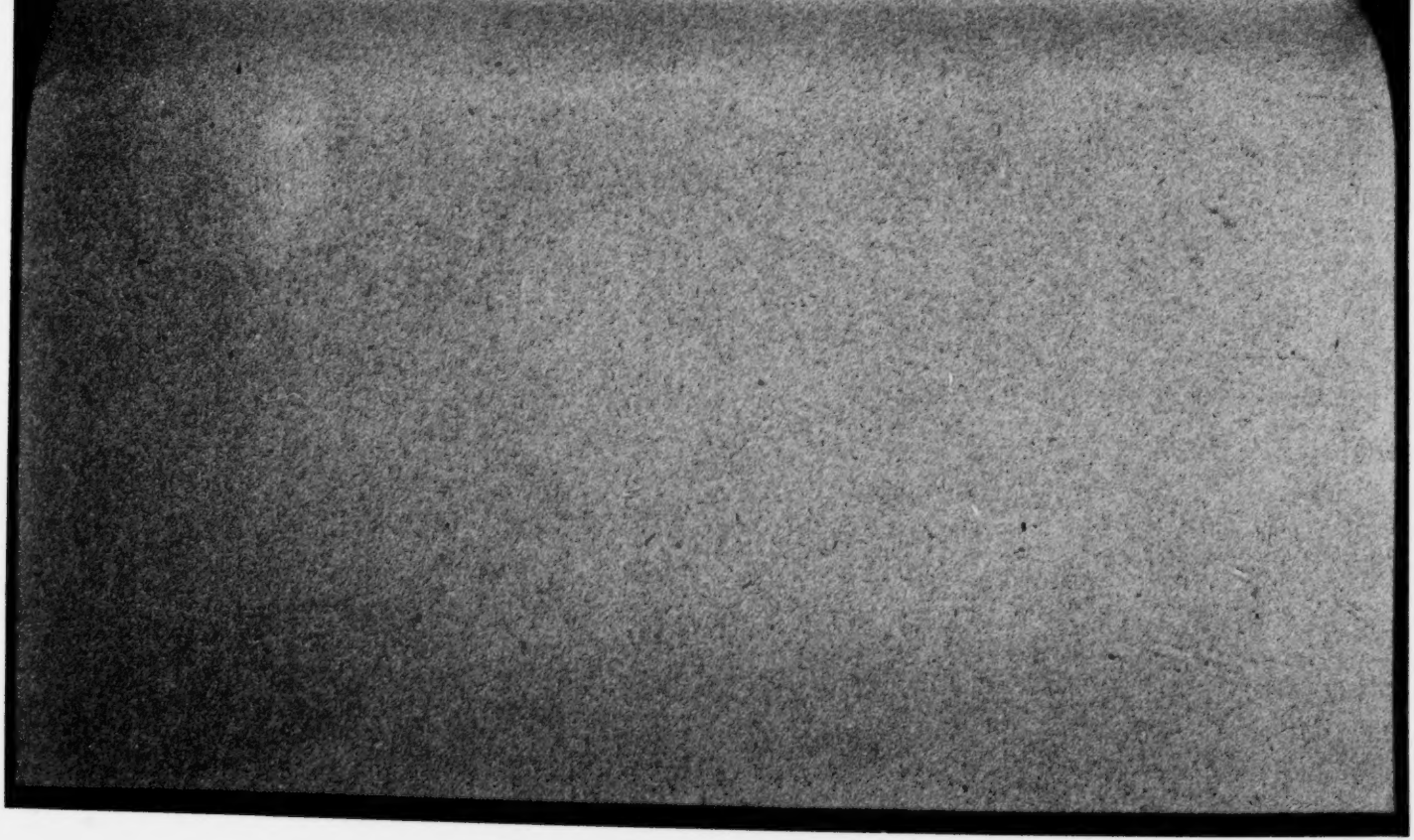
SAMUEL M. CLYATT, PETITIONER,

vs.

THE UNITED STATES, RESPONDENT.

TRANSCRIPT OF RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO BRING UP WHOLE RECORD AND CAUSE.

(19,310.)



(19,310.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 659.

SAMUEL M. CLYATT, PETITIONER,

vs.

THE UNITED STATES, RESPONDENT.

INDEX.

	Page.
Caption	1
Order of commissioner	2
Indictment	3
Verdict and order of commitment	4
Motion for new trial	5
Motion in arrest of judgment	6
Order overruling above motions	7
Sentence	7
Order as to filing bill of exceptions	8
Petition for writ of error	8
Assignment of errors	9
Order as to supersedeas bond	10
Bond	10
Bill of exceptions	11
Testimony of J. R. Dean for plaintiff	11
H. S. Sutton for plaintiff	13
W. E. Yearty	14
E. T. Ford for plaintiff	15
Citation and service	20
Writ of error	20
Clerk's certificate	21
Order designating judges	21
Argument in part	22
Submission	22
Order	22
Statement and questions certified	23
Clerk's certificate	27

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 25, 1904. 10971

Transcript of Record.

United States Circuit Court of Appeals, Fifth Circuit.

SAMUEL M. CLYATT, Plaintiff in Error,
versus
THE UNITED STATES, Defendant in Error. } No. 1151.

Error to the United States circuit court for the northern district of Florida.

(Original record filed April 21, 1902.)

Caption.

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1903, and held in the court room of said court, in the city of New Orleans, before the Honorable David D. Shelby, United States circuit judge for the fifth judicial circuit; the Honorable Thomas S. Maxey, United States district judge for the western district of Texas, and the Honorable Thomas G. Jones, United States district judge for the northern and middle districts of Alabama.

SAMUEL M. CLYATT, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error. } No. 1151.

Be it remembered that heretofore to-wit: on the 21st day of April, 1902, a transcript of the record of the above styled cause from the circuit court of the United States for the northern district of Florida, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit, in the words and figures following, to-wit:

In the United States Circuit Court, Northern District of Florida.

Be it remembered, that on the 29th day of May, A. D. 1901, one S. M. Clyatt being under arrest as a prisoner of the United States, charged before the Honorable Fred Cubberly, a commissioner of the United States in and for said district, residing at Bronson, State of Florida, with having violated section 5526 of the Revised Statutes of the United States and having had a hearing according to law, before the said commissioner, was, by said commissioner, bound over to appear and answer said charge before the United States circuit court

for the northern district of Florida, holding a session at Tallahassee, which order was in writing and is in the words and figures following, to-wit:

THE UNITED STATES
versus
S. M. CLYATT.

Violation of section 5526, R. S. U. S.

Whereas, the above named defendant, S. M. Clyatt, having had a hearing before me this 29th day of May, A. D. 1901,

And, whereas, there appearing from the evidence to be probable cause therefor,

It is ordered that the said defendant, S. M. Clyatt, be held in $500.00 bail, to be and appear to answer said charge at the next term of the United States circuit court for the northern district of Florida, held at Tallahassee, on the first day of next term, A. D. 1901, and in default thereof to be remanded to the custody of —.

FRED CUBBERLY,
U. S. Commissioner.

(Indorsements:) The United States *vs.* S. M. Clyatt. Order of commissioner. Filed July 27th, 1901. F. W. Marsh, clerk, per W. C. Hodges, D. C.

And afterwards, to-wit: on the twenty-first day of November, in the year of our Lord, one thousand nine hundred and one, at a term of the United States circuit court in and for the northern district of Florida, a grand jury of said court, duly empaneled and sworn according to law, and organized and in session, came into court and made a presentment, which was entered upon the minutes of said court and is in the words and figures following, to-wit:

THE UNITED STATES
vs.
SAMUEL M. CLYATT. } No. 116.

Indictment, violation section 5526 R. S. A true bill.

EDWARD B. EPPES, *Foreman.*

The indictment which the aforesaid grand jury presented as aforesaid, was filed by the clerk on said day and entered upon the records of said court, and is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Northern District of Florida, in the Fifth Judicial Circuit.

At an adjourned term of the circuit court of the United States for the northern district of Florida, in the fifth circuit, begun and held

at the city of Tallahassee, within and for the district aforesaid, on the nineteenth day of November, in the year of our Lord, one thousand nine hundred and one.

NORTHERN DISTRICT OF FLORIDA, *ss*:

The grand jurors of the United States of America, empaneled and sworn within and for the district aforesaid, on their oaths present, that one, Samuel M. Clyatt, heretofore, to-wit: on the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did, then and there, unlawfully and knowingly return one, Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley returning them the said Will Gordon and Mose Ridley to work to and for Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt and Tift, to be held by them the said Clyatt & Tift to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

2nd. And the grand jurors aforesaid, on their oaths aforesaid, do further present, that one, Samuel M. Clyatt, heretofore, to-wit: on the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid and within the jurisdiction of this court, did, then and there, unlawfully and knowingly cause and aid to be returned Will Gordon and Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and Mose Ridley, causing and aiding them the said Will Gordon and Mose Ridley to be returned to work to and for Samuel M. Clyatt, D. T. Clyatt and H. H. Tift, co-partners doing business under the firm name and style of Clyatt & Tift to work out a debt claimed to be due to them the said Clyatt & Tift by them, the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

JOHN EAGAN,
United States Attorney.

(Indorsements:) No. 116. United States circuit court, northern district of Florida. The United States *vs.* Samuel M. Clyatt. Indictment. Vio. sec. 5526 R. S. U. S. A true bill, Edward B. Eppes, foreman. Witnesses: Wm. E. Yearty, J. R. Dean, H. S. Sutton, Ed. P. Ford. Filed November 21st, 1801. F. W. Marsh, clerk. John Eagan, U. S. attorney.

At a stated term of the circuit court of the United States for the northern district of Florida, begun and held at the city of Tallahassee, on the 21st day of November, A. D. 1901, the following proceedings were had in open court, to-wit:

THE UNITED STATES
vs.
SAMUEL M. CLYATT. } No. 116.

Indictment: Violation section 5526, Rev. Statutes of U. S.

And now at this time the grand jury of the United States came into court and presented the foregoing indictment, indorsed "A true bill, Edward B. Eppes, foreman."

And afterwards, on the 25th of March, A. D. 1902, the following proceedings were had in open court:

THE UNITED STATES
vs.
SAMUEL M. CLYATT. } No. 116.

Indictment: Violation section 5526, Rev. Statutes of U. S.

And now at this time came the United States by John Eagan, United States district attorney for the northern district of Florida, and prayed that the defendant, Samuel M. Clyatt, be arraigned upon said indictment for having violated section 5526 of the Revised Statutes of the United States.

Whereupon, said defendant was ordered to appear and answer the charge in said indictment preferred.

And the said defendant, being in court, was brought to the bar, and after hearing the said indictment read, pleaded not guilty.

Whereupon said cause was called for trial, and upon motion of the respective parties, the following jury was called, to-wit:

1. J. B. Bozeman,
2. John Parramore,
3. Lynn Kilburn,
4. J. B. Switzer,
5. W. C. Durham,
6. T. J. Allen,
7. F. J. Egbert,
8. G. W. Houston,
9. B. W. Rogers,
10. H. G. Land,
11. J. D. Johnson,
12. A. C. Grissett,

who being duly chosen, tried and sworn, and after hearing the evidence, argument, and counsel and charges of the court, retired to consider of their verdict, and after due consideration, came into court and presented the following verdict, to-wit:

"We the jury, find the defendant guilty, so say we all.
(Signed) W. C. DURHAM, *Foreman.*"

Whereupon, the court not being fully advised in the premises, ordered that the said defendant, Samuel M. Clyatt, be remanded to

the custody of the keeper of the Leon county jail, Florida, to await the further order of the court in the premises.

And afterwards, to-wit: on the twenty-sixth day of March, A. D. 1902, came the defendant, Samuel M. Clyatt, and entered up-n the motion docket of said court the following motion, to-wit:

In the United States Circuit Court, Northern District of Florida.

THE UNITED STATES
vs.
SAMUEL M. CLYATT. } No. 116. Peonage.

Comes now on this 26th day of March, 1902, the defendant, Samuel M. Clyatt, who on yesterday was convicted of the offence charged in the indictment for the above offense, and moves the court for a new trial and argues the following reasons therefor:

1st. That the verdict was contrary to the evidence.

2nd. Was contrary to the weight of evidence.

3rd. That the verdict was without evidence to support the same.

4th. That the statute, to-wit: sec. 1990, of the Revised Statutes of the United States, was not applicable to the facts as testified to in this case.

5th. That there was no proof that the named Will Gordon and Mose Ridley prior to the time alleged in the said indictment, to-wit: on the 11th day of February, 1901, had ever been held to service under the system known as peonage, or that they or either of them had before then or ever afterwards been held to service under the system by the acts or connivance of this defendant.

6th. There is no proof that the above Gordon or Ridley, or either of them, were ever by this defendant subjected to either voluntary or involuntary service or labor as peons in liquidation of any debt or obligation in any manner by this defendant.

7th. That the court erred in holding that the defendant was liable for or on any account under the statute.

8th. That the court erred in allowing testimony as to the custom generally by others engaged in the same business, to-wit: the manufacture of naval stores, to compel laborers to return to their service in liquidation of pre-existing debts.

9th. That the court erred in permitting the United States attorney to discredit his own witnesses as in allowing him to prove that the firm of Clyatt and Tift embraced also this defendant.

10th. That the court also erred in permitting evidence that it was not the intention of the deputy sheriff, Yearty, to have taken his prisoners, Will Gordon and Mose Ridley, to the county jail at Bronson to be dealt with under the warrant held by him for their arrest and that he would have done so, but for their voluntary election to return with the defendant to the town out of which the warrant issued, charging them with the offenses of gaming or larceny or one or both.

11th. That there is no evidence whatever that the said Will Gordon or Mose Ridley or either of them ever returned to service with this defendant or upon any service with which he was connected.

12th. That the proof is in no way confined to the indictment.

HENDERSON AND HENDERSON AND
C. W. FULWOOD,
Att'ys for Samuel M. Clyatt, the Defendant.

And afterwards, to-wit: on the 27th day of March, A. D. 1902, the following motion was also entered upon the motion docket of said court, to-wit:

In the United States Circuit —, Northern District of Florida.

THE UNITED STATES
vs.
SAMUEL M. CLYATT.

Now comes the defendant, after verdict and before sentence, by his attorneys, and moves the court to arrest the judgment in this cause and that he be discharged and allowed to go without day on the following grounds, to-wit:

1st. That the statute under which this indictment is found, to-wit: section- 1990 and 5526 of the Revised Statutes of the United States, do not apply to the charges made against this defendant in the indictment or to the evidence in support of the same.

2nd. That there was no proof whatever of any peonage previous to or subsequent to the finding of the indictment, on Mose Ridley or Will Gordon inflicted or caused to be inflicted by this defendant, supporting the offense of peonage as charged in this indictment.

3rd. That the offense of peonage as defined in the statute and the punishment therefor as defined and provided in the sections 1990 and 5526 of the Revised Statutes of the United States, if constitutional, which is denied, was never made applicable to the fact stated and proven in the indictment and such offenses as were proven are cognizable only in the State courts, no Federal jurisdiction appears in this cause.

4th. No system of peonage is charged or proven to have been in evidence within this jurisdiction.

5th. The proof of an existing custom not charged in the indictment to exist in Levy county, Florida, or in any other locality, could not supply the absence of any proof as to the return of Gordon and Ridley to a condition of involuntary servitude.

Wherefore, this defendant prays for the reasons apparent in the record that such judgment be arrested.

HENDERSON AND HENDERSON AND
C. W. FULWOOD,
Attorneys for Samuel M. Clyatt, the Defendant.

March 27th, 1902.

And on the same day, to-wit: on the 27th day of March, A. D. 1902, the following orders overruling the said motions were made and entered of record in the above entitled cause, to-wit:

In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

THE UNITED STATES
vs.
SAMUEL M. CLYATT. } No. 116. Peonage.

The motion in arrest of judgment by the defendant is hereby overruled.

And to this ruling the defendant hereby excepts and asks that this exception be noted, which is done.

In open court, sealed and signed.

CHAS. SWAYNE, *Judge.*

M'ch 27th, 1902.

Came also to be considered the motion of defendant for a new trial, and after argument of counsel is hereby overruled, to which the defendant excepts and prays that this be noted, which is done, sealed and signed in open court.

CHAS. SWAYNE, *Judge.* [SEAL.]

M'ch 27.

(Indorsements:) In U. S. court, nor. dist. of Fla. United States *vs.* Samuel M. Clyatt. Order overruling motion in arrest of judgment and order overruling motion for new trial. Filed March 27th, 1902. F. W. Marsh, clerk.

And afterwards, to-wit: on the 27th day of March, A. D. 1902, the following proceedings were had in open court, to-wit:

THE UNITED STATES
vs.
SAMUEL M. CLYATT. } No. 116.

Indictment: Violation section 5526, Rev. Statutes of U. S.

And now at this time came the United States, by John Eagan, United States district attorney for the northern district of Florida, who prayed the judgment of the court upon one Samuel M. Clyatt, heretofore convicted before this court of a violation of section 5526 of the Revised Statutes of the United States, and the said defendant being brought into court, and the court being fully advised in the premises, or-ered the said defendant to the bar of the court and imposed the following sentence:

It is ordered and adjudged that the said defendant, Samuel M. Clyatt be taken hence to the Federal penitentiary at Atlanta, in the

State of Georgia, and there confined at hard labor for the full term and period of four years from the 27th day of March, A. D. 1902, and that he stand committed until the terms of this sentence be compled with, or until he be discharged by due course of law.

And afterwards, on the same day, to-wit: on the 27th day of March, A. D. 1902, the following order was made in the above entitled cause and filed with the clerk, to-wit:

In the Circuit Court of the United States, Fifth Circuit and Northern District of Florida.

THE UNITED STATES
vs.
SAMUEL M. CLYATT. } No. —. Peonage.

Ordered that the defendant be allowed twenty-five days from this 27th day of March, inst., for settling and having signed his bill of exceptions herein.

Done and ordered in open court, this March 27th, 1902.

CHAS. SWAYNE, *Judge.*

(Indorsements:) The U. S. C. C., N. dist. of Fla. The United States *vs.* Samuel M. Clyatt. Order extending time for settling bill of exceptions, etc. Filed March 27th, 1902. F. W. Marsh, clerk.

And afterwards, the defendant, by his attorneys, filed the following petition for a writ of error in the above entitled cause, to-wit:

In the United States Circuit Court, Fifth Circuit, Northern District of Florida.

THE UNITED STATES
vs.
SAMUEL M. CLYATT.

Comes now the defendant, Samuel M. Clyatt, and respectfully asks for a writ of error from the order and sentence, and the proceedings leading thereto, to his conviction in this court of the charge of the crime known as peonage on the 25th day of March, A. D. 1902. Said writ to be made returnable April 25th, 1902.

HENDERSON & HENDERSON AND
C. W. FULWOOD,
Defendant's Attorneys.

March 27th, 1902.

(Indorsements:) Circuit court of United States, northern district of Florida. United States *vs.* Samuel M. Clyatt. Petition for writ of error. Filed March 27th, 1902. F. W. Marsh, clerk.

And at the same time, to-wit: on the 27th day of March, A. D. 1902, the following assignment of errors was filed in the said cause by the defendant therein, to-wit:

In the United States Circuit Court, Fifth Circuit, Northern District of Florida.

THE UNITED STATES
vs.
SAMUEL M. CLYATT.

Comes now the defendant, Samuel M. Clyatt, and makes the following assignment of errors:

1. The court erred in overruling the motion of defendant for the arrest of the judgment in this cause upon the several grounds alleged therein.

2. The court erred in refusing defendant's motion for a new trial upon each and every ground alleged therein.

3. Sections 1990 and 5526 of the Revised Statutes of the United States, under which the defendant was tried and convicted, are not applicable to this case. There is no allegation or proof of the existence of any system of peonage anywhere in the States of Florida or Georgia.

4. There is no allegation that any act, law resolution, orders, regulations or usages, which had been before established, maintained or enforced, is charged in the indictment or that by virtue of any of these an attempt has been made in this case to establish, maintain, and enfore, directly or indirectly, the voluntary or involuntary service or labor of any person as peons in liquidation of any debt or obligation, or otherwise, and there is no proof against this defendant of having done so, or of having assisted in the arrest or return of Gordon and Ridley to any condition of peonage.

5. The statutes were made and intended to be applied to a system in existence in the Territory of New Mexico and not extended to any State wherein the system then existing in New Mexico did not obtain.

6. The court erred in admitting any proof as to the existence of a custom prevailing in Levy county, Florida, to take laborers by force and arms, or otherwise, and return them to labor and service in liquidation of any debt or obligation.

March 27th, 1902.

(Indorsements:) Circuit of United States, northern district of Florida. United States *vs.* Samuel M. Clyatt. Assignment of errors. Filed March 27th, 1902. F. W. Marsh, clerk.

And thereafter, the jndge of said court made and caused to be entered of record in the above entitled cause an order granting the defendant leave to file a supersedeas bond in the said cause, which order is in the words and figures following, to-wit:

In U. S. Circuit Court, 5th Circuit, Northern Dist. of Florida.

THE UNITED STATES
vs.
SAMUEL M. CLYATT.

The defendant having filed his writ of error to the circuit court of appeals from his conviction and sentence in this cause:

The order of supersedeas from the sentence herein imposed is hereby allowed, upon the filing in this court of the bond of defendant, with good and sufficient surety, in the penal sum of twenty-five hundred dollars, to be approved by the court, conditioned for the appearance of the defendant to abide the results of his writ of error and to surrender himself to this court if judgment hereof be affirmed.

Done and ordered in open court, March 27th, 1902.

CHAS. SWAYNE, *Judge.*

(Indorsements:) In U. S. Ct. Ct., N. Dist. of Fla. U. S. *vs.* Samuel M. Clyatt. Order for supersedeas. Filed March 27th, 1902. F. W. Marsh, clerk.

And thereafter, and on the same day, to-wit: on the 27th day of March, A. D. 1902, the defendant came into court and filed a supersedeas bond in pursuance of the terms of the foregoing order, which was duly approved, and is in the words and figures following, to-wit:

In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida.

UNITED STATES
vs.
SAMUEL M. CLYATT.

Know all men by these presents, that we, Samuel M. Clyatt, as principal, and Julius Diamond, L. C. Yaeger and John A. Henderson are held and firmly bound unto the United States of America in the full and just sum of twenty-five hundred dollars, to which payment, well and truly to be made, we bind ourselves, heirs, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of March, A. D. 1902.

Whereas, lately at the spring term, A. D. 1902, of the circuit court of the United States, fifth circuit, northern district of Florida, in a suit pending in said court between The United States of America, plaintiff, and Samuel M. Clyatt, defendant, a judgment and sentence was rendered against the said Samuel M. Clyatt, and the said Samuel M. Clyatt has obtained a writ of error from the United States circuit court of appeals for the fifth circuit to reverse the judgment and sentence in the aforesaid suit, and citation directed to the said United States of America citing and admonishing the United States

of America to be and appear in the United States circuit court of appeals for the fifth circuit, at the city of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said Samuel M. Clyatt shall be and appear at Tallahassee and shall abide by and obey all orders made by said United States circuit court of appeals for the fifth circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said court may direct, if the judgment and sentence of the said circuit court against him shall be affirmed by the said United States circuit court of appeals for the fifth circuit, then the above obligation be void; else to remain in full force, virtue and effect.

S. M. CLYATT. [SEAL.]
JULIUS DIAMOND. [SEAL.]
L. C. YEAGER. [SEAL.]
JOHN A. HENDERSON. [SEAL.]

Approved:
CHAS. SWAYNE,
Judge of the U. S. Circuit Court, Fifth Circuit, Northern District of Florida.

(Indorsements:) The United States *vs.* S. M. Clyatt. Supersedeas bond. Filed March 27th, 1902. F. W. Marsh, clerk.

And afterwards, to-wit: on the seventeenth day of April, A. D. 1902, the defendant in the above entitled cause, by his attorneys, filed his bill of exceptions in the said cause, which remains of record and is in the words and figures following, to-wit:

In the Circuit Court of the United States in and for the Northern District of Florida.

Be it remembered, that at a term of the United States circuit court in and for the northern district of Florida, held at Tallahassee, Florida, on the 24th day of March, in the year of our Lord one thousand nine hundred and two, a cause therein pending, wherein The United States was plaintiff, and Samuel M. Clyatt was defendant, came on to be heard before the Honorable Charles Swayne, judge of said court, on which date came the said parties and their respective attorneys.

And thereupon the said issue in manner aforesaid joined between the said parties, came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the issues in manner aforesaid joined.

And thereupon the plaintiff to maintain the issues upon its part, produced and offered as a witness JAMES R. DEAN, who being first duly sworn, did testify as follows:

I live in Alachua county, Florida. I lived in Levy county last year. I know Mr. Clyatt, the defendant, but am not well acquainted with him. Both Will Gordon and Moses Ridley, colored men, were working for me making turpentine in February, 1901. I have been engaged in making turpentine and naval stores for seventeen years, two years in Florida, and fifteen years in Georgia. I don't know where the two men Gordon and Ridley are; have not seen them since Mr. Clyatt carried them away. Mr. Yearty, deputy sheriff, came to my house at my still in Levy county, Florida, on the night of the — day of February, A. D. 1901, and called me up about four o'clock in the morning. He told me that Mr. Clyatt was with him, and that he had five warrants for some turpentine hands on my place, and told me their names. He told me that Clyatt was at the foot of the sand hills about four or five hundred yards from my house. I told him that I had been sick and did not want to go out, but finally went with Yearty to where Clyatt was. Before I went over there Yearty showed me the warrants. I told him that one of the men was not on my place, the other four were. When I got to where Clyatt was, I told him that the man by the name of Hackett was not there—the other four were. He told me they owed him. We went then to my commissary, up nearer my house. I paid Clyatt the amount he had against two of the men, which he took, and I offered to pay him his charges against Gordon and Ridley, which he said was about nineteen dollars for one, and eight or nine dollars for the other. He refused to let me pay their indebtedness, and they were arrested. He said he wanted to carry them back to Georgia and make an example of them. Mr. Clyatt had along with him Mr. Taylor and Mr. Ford. They all came from Georgia with him. They were all armed with guns. Clyatt said the warrants under which the arrests of Gordon and Ridley were made were for gaming. Though I saw the warrants I did not read them. The deputy sheriff, Yearty, handcuffed the two men and carried them off. The men both protested against going. One of them refused to put his hand in the cuff, and Mr. Clyatt threw his gun on him and made him put his hand in. This was about daybreak. Clyatt settled with me for the amount of my bills against Gordon and Ridley, about eighteen or twenty dollars for both. They put the men in a buggy with the deputy sheriff and the driver and left my place, Clyatt, Ford and Taylor following the team. One of the colored men said he did not owe him and did not want to have to go. Gordon protested. Clyatt said, I reckon you will go, and threw *him* gun on him. I have had men go off from me owing me and I always found them and they paid me.

Question by PLAINTIFF'S ATTORNEY: "Mr. Dean, is it a general custom among turpentine men to swear out warrants for hands when they go away owing debts, and have them arrested and returned?"

Question objected to by defendant's attorney on the ground that such a custom is not alleged in the indictment and is irrelevant.

Objection was overruled and exception taken by defendant's attorney.

Answer. "I do not know of the custom to swear out warrants. I never took out warrants myself.

I heard that Gordon and Ridley were at Waterloo, Georgia, soon after they were taken from my place. The defendant said that was his place of business. I saw letter soon after the men were taken from my place. Don't know the handwriting—it had same heading and printing on it as this letter. (Being letter-head introduced in evidence during examination of E. P. Ford.) I do not know where Gordon and Ridley, the two negroes that were taken from my place are now. I have never seen them since. Their trunks and some clothes and bedding were left at my place and are still there. I never saw Clyatt, the defendant, or Ford, or Taylor, the men who were with him, before. I never had any trouble with them.

The plaintiff then introduced and offered as a witness, H. S. SUTTON, who being first duly sworn, did testify as follows:

I am the sheriff of Levy county, Florida—been such for four years—am in my fifth year now. I know the defendant, Clyatt. He has lived in Levy county, but he now lives in Georgia. He was not living in Levy county in February, 1901. He was engaged in the turpentine and naval stores business in this county, but went to Georgia, about six years ago. Clyatt came to see me in February, 1901, at Bronson; showed me some warrants and wanted me to execute them for him on some darkies. He found me at the train by accident and showed me his papers. It was the usual custom to take these papers and get a settlement. I told him that I could not go with him, but that I would give him a note to my deputy, and I gave him a note to Mr. Yearty, deputy sheriff. Through a letter from a Mr. Tillis I was advised that Mr. Clyatt would be at Bronson by a certain date, but he did not come on that date, and I was at the train by accident. It was late in the afternoon when the train came in—about five o'clock. I told him I could not go with him that night, but gave him a note to Mr. Yearty. The warrants were sworn out and issued in Georgia by some justice of the peace or county judge, I did not know before now that I had no right to arrest anybody on such papers. I knew that to carry them into another State they had to bring extradition papers, but I did not know that would prevent their arrest and keeping the prisoners until such papers came. I had frequently served such warrants for turpentine men, and had done so for James R. Dean and have in my office now in Levy county several warrants to serve for Mr. Dean.

Question by PLAINTIFF'S ATTORNEY: Mr. Sutton, is it a general custom among turpentine men in Florida and Georgia to have negroes arrested in this way?

Objected to by defendant's attorney on the ground that no such custom is alleged in the indictment, and is irrelevant.

Which objection was overruled and exception taken by defendant's attorney.

Answer. It has been the universal custom and practice of the turpentine men in Georgia and Florida to go and take negroes whenever they wanted to in this way.

The plaintiff then produced and offered as a witness, W. E. YEARTY, who, being first duly sworn, did testify as follows:

I have lived in Levy county, where I now reside, since the winter of 1853–4. I was the deputy sheriff of Levy county in February, 1901. I have been deputy sheriff, marshal and deputy marshal, off and on for thirty odd years. I know the defendant, Clyatt. He came to the house where I was sitting up with a corpse in the fore part of the night of the — day of February, 1901, about fifteen miles from Bronson near Rocky ——, and about five miles from Dean's still. He told me that he had come to my house. Clyatt was in a carriage with the driver and Ford and another white man. This was off the railroad. Clyatt told me he had some papers, warrants, for me to serve, and a note from the sheriff, Mr. Sutton. I went with him to Dean's still. There were five warrants, but I could not make out what they were for, as I had left my spectacles at home and it was night, but I knew that they were made out by an officer in Georgia. I thought I knew they were warrants. And the two served on Gordon and Ridley were for stealing. We got to Dean's still at five o'clock in the morning, as the office clock bell was ringing. We lost our way and beat about in the woods for the long interval. The team and others stopped at the foot of the sand hills, and I went up to Mr. Dean's house and called him up and told him that I had some warrants I wanted to serve on some men at his place, and gave him their names. He said one of them was not there. I told him Mr. Clyatt came with them. He said he had been sick and did not want to come out, and asked me where Clyatt was. I told him he was at the foot of the sand hills. He put on his clothes and we went together to where Clyatt was. After some talk, we all went to Dean's commissary. Clyatt and Dean had some settlements as to the men included in two of the warrants, but Clyatt refused to take Dean's offer of settlement for the other men. Said they did not owe him anything, and that he wanted them for stealing. This occurred back in the far end of the commissary. Dean was sitting inside of the office. I took the two men with me. I put the hand-cuffs on them myself and they did not resist. One of them sort of pulled back a little, as they usually do, and I told him to put his hand in the cuff, and he did it. I did not see Mr. Clyatt throw his gun on either of them at any time. I put them in the wagon and got in with the driver. I did not see Clyatt, nor Ford, nor the other man any more until I got to the railroad station. They started on foot behind me. While we were driving along the colored men asked me what I was going to do with them. I told him I was going to take them to Bronson and put them in the county jail to be kept there until the court disposed of them. They said they did not

want to go to jail, and asked me if they could not go on to Georgia with Mr. Clyatt. I told them that was as he said, and that I would ask him when he came up. We heard the whistle of the train blow when we were approaching the station. We got out in a hurry, and just then Mr. Clyatt and his party came up in Mr. Dean's wagon. I told Mr. Clyatt that Gordon and Ridley would rather go to Georgia with him than to go to jail at Bronson, where I would certainly have carried them but for their preference to go to Georgia with Clyatt. Clyatt said that if they wanted to go along with him he was perfectly willing to carry them. They got aboard of the train. Mr. Clyatt paid me five dollars for my services in the matter. I charged him five dollars because it was a reasonable compensation for the work done, and it was about what I thought would have been the mileage for the service of the two warrants. They all got on the train, and the hand-cuffs, which I got from Mr. Clyatt at Dean's commissary, were not then removed, but were left on Gordon and Ridley. I always hand-cuff prisoners, but not having any with me I got a pair from the defendant. It has always been my practice when I make arrests to hand-cuff prisoners and not to take their word. I did not know until now that I had no right to serve warrants issued in another State. Mr. Clyatt and the other parties with him had guns. Clyatt, the defendant, furnished the hand-cuffs to put on the men.

The plaintiff then produced and offered as a witness, E. T. FORD, who, being first duly sworn, did testify as follows:

I live in Colquitt county, Georgia, and lived there in February, 1901. Waterloo is in Irvine county twelve miles southwest from Moultrie. It is about forty or fifty miles from Waterloo to my place. I know the defendant, Clyatt, he lives at Tifton, Georgia, nine or ten miles west of me. Clyatt has a place at Waterloo belonging to Clyatt & Tift. I have known Clyatt nine or ten years. He is engaged in the turpentine business. I have been in that business twelve or fifteen years in Georgia and Florida, in Levy and Baker counties, in Florida. I know the witness, James R. Dean. I worked for Clyatt & Tift—ran a still for them for a while and was a woods rider for a while. I know a firm of Clyatt & Tift; it consists of D. T. Clyatt and H. H. Tift. The defendant was not a partner in the firm of Clyatt & Tift. (The witness shown a letter-head, which he said was their letter-head, same as was introduced in evidence, which was in the words and figures as follows, to-wit:

D. T. Clyatt. S. M. Clyatt, manager. H. H. Tift.

Clyatt & Tift,
Manufacturers of naval stores and dealers in general merchandise,
Waterloo, Ga.

I know that this defendant was not a partner; but that he had the general charge and management of the business; that he hired

and discharged labor and superintended generally the business of that firm. I do not know that the defendant shared in the profits. I met Clyatt at Tifton. He said he had some darkies to look after and wanted me to go with him to Florida. I could not swear what he came for. He said he had some warrants. I came along with him. We got to Bronson four or five o'clock in the evening. I do not know what the charges were in the warrants. Clyatt showed the warrants to Sheriff Sutton, who handed them back to Clyatt with a note to Yearty, his deputy. I had a gun, so did Clyatt and one Taylor, who came with us from Georgia. I do not know how many round- of ammunition the others had. I had six or eight or a dozen cartridges. I did not know that Clyatt came to carry negroes back with him. I never knew that it required Florida warrants. I went with Clyatt and Taylor to the deputy sheriff's, and with him to Dean's place; got there just before day in the morning. I never saw Dean before that morning, and not until about day-light, when he came to where we were at the foot of the sand hills. The deputy sheriff arrested two darkies and took them to Rosewood. Did not see the darkies after we left Dean's commissary until I saw them at the railroad when we got there. They had hand-cuffs on, which is usual in the arrest of criminals. Did not know that Clyatt had hand-cuffs with him. Did not see him give the hand-cuffs to the sheriff; he had a small grip with him. I stood within fifteen or twenty feet of the cuffing. I was just inside of the one door to the house, with my gun leaning up against the side of the house. Mr. Taylor was there also with me. Clyatt and the deputy sheriff were at the other end of the commissary, fifteen or twenty feet from us. Dean was inside of his office at that end. There was no opening to the commissary. Clyatt had his gun inside with him. I saw the prisoners make no objection or any resistance. Dean was on a stool and the men outside of his office. I did not see Clyatt level the gun on either of the prisoners. A little business transaction took place between Clyatt and Dean. Dean paid Clyatt for some of the men, and one for whom he had warrant was not in the place. He paid Dean his bill for these two men Gordon and Ridley. The sheriff took the prisoners in the team in which we came out and drove ahead of us to Rosewood on the railroad, Clyatt, Taylor and myself following behind on foot. We overtook a wagon and asked the driver for permission to ride. He consented and we drove along behind, but not in sight of the deputy sheriff. The wagon went in an ordinary pace until we heard the coming of the train. The driver trotted the team of mules for two or three hundred yards to the station. The sheriff told Clyatt that his prisoners wanted to go with him to Georgia instead of being locked up in the Bronson jail. Clyatt said, all right, if they wanted to go, he would carry them. I went into the second-class coach where the men were seated still with the hand-cuffs on. Between Rosewood and Gainesville, I got the key to the cuffs and turned the men loose, but kept a watch on them.

Every time the train stopped looked to see that they did not get off. We were at Gainesville about two or three hours, and Clyatt, Taylor and myself went to a restaurant and got dinner; did not register at any hotel. When we got back to the station at Gainesville to take the train Gordon and Ridley went on with us, they in the colored coach and we in the white coach. At Jasper we stopped at night to change cars and get supper for an hour or two. Gordon and Ridley were not kept under watch and were free to go as they pleased while at Jasper. They met us after we had had supper and we went on to Tifton, arriving there between twelve and one o'clock at night. I went with Clyatt to his house in Tifton, and spent the night there, and I left about day-light the next morning for my home. I never saw Gordon or Ridley any more after they got off the train at Tifton, and we took them to defendant's house. I do not know who paid their fare to Gainesville; did not see any tickets bought. I bought and paid for the tickets for one of them myself from Gainesville to Jasper or Tifton. I never charged or received any money for my expenses on the trip or for money paid for the tickets. I do not now work for Clyatt. I am not related to him. My wife is his niece. I know one Davis, who, in February, 1901, was working for Mr. Dean in Levy county, Fla. I think he was a woods rider for Mr. Dean. I heard that he and Mr. Clyatt had had a personal difficulty some time before in Georgia, about some hands. And I heard Mr. Clyatt say that he had been informed that Dean and Davis said they were going to do him up when they caught him in Florida, and it was for the purpose of seeing that Clyatt was not imposed upon that Taylor and I went with him and carried our guns.

To the court, who asked the witnees if he did not know he was going for hands, and that he went for the hands, witness said: "Yes;" and immediately said that his going, and going armed, was because of the expected difficulty with Davis. He saw Davis passing at a distance while he was at the commissary at Dean's still, but had no talk with him.

Neither the defendant, Clyatt, or Taylor, who was with us, or myself were officers.

Whereupon the plaintiff rests its case.
Defendant rests—introduces no testimony.

And the said judge, after charging the jury on the law in the case, submitted the said issues and the evidence so given on the trial, to the jury, and the jury aforesaid then and there gave their verdict for the plaintiff in the words and figures following, to-wit:

We, the jury, find the defendant guilty. So say we all.
(Signed) W. C. DURHAM, *Foreman.*

And the said defendant, by his attorneys, then and there at the term of the court aforesaid, did enter in writing and submit to the

said court his motion to arrest the judgment in this cause, and that he be discharged and allowed to go without day, on the following grounds, to-wit:

1. That the statutes under which the indictment is found, to-wit: secs. 1990 and 5526, of the Revised Statutes of the United States, do — apply to the charges made against this defendant in the indictment; or to the evidence in support of the same.

2. That there was no proof whatever of any peonage previous to or subsequent to the finding of the indictment, on Moses Ridley or Will Gordon inflicted, or caused to be inflicted by this defendant, supporting the offense of peonage as charged in the indictment.

3. That the offense of peonage, as defined in the statutes, and the punishment therefor, as defined and provided in the sections 1990 and 5526 of the Revised Statutes of the United States, if constitutional, which is denied, was never made applicable to the facts stated and proven in this indictment, and such offenses as were proven are cognizable only in the State courts. No Federal jurisdiction appears in this cause.

4. No system of peonage is charged, or proven, to have been in existence within this jurisdiction.

5. The proof of an existing custom not charged in the indictment to exist in Levy county, Florida, or in any other locality, could not supply the absence of any proof as to the return of Gordon and Ridley to a condition of involuntary servitude.

And the said motion coming on to be heard on the — day of March, A. D. 1902, at the term aforesaid, the said court did consider and decide that the said motion should not be granted.

To which decision the said defendant, by his attorneys, did then and there except.

And the said defendant, by his attorneys, then and there at the terms of the court aforesaid, did enter in writing and submit to the said court his motion for a new trial, for the reasons following, to-wit:

1. The verdict was contrary to the evidence.

2. Was contrary to the weight of evidence.

3. That the verdict was without evidence to support the same.

4. That the statute, to-wit: section 1990 of the Revised Statutes of the United States is not applicable to the facts as testified to in this cause.

5. That there was no proof that the named Will Gordon and Mose Ridley prior to the time alleged in said indictment, to-wit: on the 11th day of February, 1901, had ever been held to service under the system known as peonage, or that they, or either of them, had before then, or ever afterwards, been held to service under the system, by the acts or connivance of this defendant.

6. That there is no proof that the above Gordon or Ridley, or either of them, were ever by this defendant subjected to either vol-

untary or involuntary service or labor as peons in liquidation of any debt or obligation, in any manner by this defendant.

7. The court erred in holding that the defendant was liable for or on any account under the statutes.

8. That the court erred in allowing testimony as to the custom, generally, by others engaged in the same business, to-wit: the manufacture of naval stores, to compel laborers to return to their service in liquidation of pre-existing debts.

9. That the court erred in permitting the United States attorney to discredit his own witnesses. As in allowing him to prove that the firm of Clyatt & Tift embraced also this defendant.

10. That the court also erred in permitting evidence that it was not the intention of the Deputy Sheriff Yearty to have taken his prisoners, Will Gordon and Mose Ridley, to the county jail at Bronson to be dealt with under the warrant held by him for their arrest, and that he would have done so but for their voluntary election to return with the defendont to the town out of which the warrants issued charging them with the offenses of gaming or larceny, one or both.

11. That there is no evidence whatever that the said Will Gordon or Mose Ridley, or either of them, ever returned to service with this defendant, or upon any service with which he was connected.

12. That the proof was in no way confined to the indictment.

And the said motion coming on to be heard on the 27th day of March, A. D. 1902, and after the motion in arrest of judgment was heard and over-ruled, and at the term aforesaid, the said court did consider and decide that the said motion should not be granted.

To which decisiou the said defendant, by his attorneys, did then and there except.

Whereupon, the court aforesaid, on the 27th day of March, A. D. 1902, at the term aforesaid, did pronounce sentence against the said defendant, and did sentence him to the Federal penitentiary at Atlanta, State of Georgia, there to be confined at hard labor for the full period of four years from the 27th day of March, A. D. 1902, as appears of record; and inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the verdict and judgment aforesaid, the said defendant, by his attorneys aforesaid, did on the — day of April, A. D. 1902, by virtue of a special order herein made during the term aforesaid, propose this his bill of exceptions to the said entries and decisions of the said judge, and request him to sign the same; which is done this the 14th day of April, A. D. 1902.

CHAS. SWAYNE,
Judge of the United States Circuit Court,
Fifth Circuit, Northern District of Florida.

(Indorsements): In the circuit court of the United States, fifth circuit, northern district of Florida. United States *vs.* S. M. Clyatt. Bill of exceptions. Filed April 17th, 1902. F. W. Marsh, clerk.

On the 27th day of March, A. D. 1902, a citation was duly issued and service thereon duly accepted by the United States through John Eagan, United States attorney for the northern district of Florida, and is in the words and figures following, to-wit:

To the United States of America:

You are hereby cited and admonished to be and appear at a term of the circuit court of appeals of the United States, for the fifth judicial circuit, to be holden at New Orleans on the twenty-fifth day of April, A. D. 1902, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Florida, at Tallahassee, wherein Samuel M. Clyatt is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence mentioned in said writ of error should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of this court on this 27th day of March, A. D. 1902.

Signed this 27th day of March, A. D. 1902.

[SEAL.] CHAS SWAYNE, *Judge.*

(Indorsed:) Samuel M. Clyatt, plaintiff in error, *vs.* The United States. Citation. Filed March 27th, A. D. 1902. F. W. Marsh, clerk. Service accepted this March 27th, A. D. 1902. John Eagan, U. S. attorney.

UNITED STATES
vs.
SAMUEL M. CLYATT.

To the judge of the circuit court of the United States for the northern district of Florida, Greeting:

Because in the record of the proceedings, as also in the rendition of the judgment and sentence which is in said circuit court before you, between the United States and the said defendant a manifest error hath happened to the great damage of the said Samuel M. Clyatt, defendant, as is, and appears in the proceedings hereof.

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then and under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the justices of the United States circuit court of appeals, for the fifth judicial circuit, at the court room of said court, in the city of New Orleans, in the State of Louisiana, together with this writ, so that you have the same at said place before the justices aforesaid on the twenty-fifth day of April, A. D. 1902, next, that the record

and proceedings aforesaid being inspected the said justices of the said circuit court of appeals may cause further to be done therein to correct that error, what of right, according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord one thousand nine hundred and two.

[SEAL.] F. W. MARSH,
Clerk of the Circuit Court of the United States of America for the Northern District of Florida, in the Fifth Judicial Circuit.

The foregoing writ of error was duly served on the day and date upon which it was issued, to-wit: on the 27th day of March, A. D. 1902, by lodging and filing with F. W. Marsh, clerk of the circuit court of the United States for the northern district of Florida, for the defendant in error, a duly certified copy thereof.

[SEAL.] F. W. MARSH, *Clerk.*

(*Clerk's Certificate.*)

UNITED STATES OF AMERICA, }
Northern District of Florida. }

I, F. W. Marsh, clerk of the circuit court of the United States for the northern district of Florida, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from one to twenty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in the circuit court of the United States for the northern district of Florida in the cause of The United States against Samuel M. Clyatt, and wherein Samuel M. Clyatt is plaintiff in error, and The United States is defendant in error, as the same remains of record and on file in said court.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Pensacola, in the said district aforesaid, this 17th day of April, in the year of our Lord one thousand nine hundred and one.

[SEAL.] F. W. MARSH, *Clerk.*

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1903.

MARCH 15, 1904.

(Extract from minutes.)

Ordered that the Honorable Thomas S. Maxey, U. S. district judge for the western district of Texas, and Honorable Thomas G. Jones U. S. district judge for the northern and middle districts of Alabama,

be, and they are hereby, designated to sit on the hearing and determination of the following cases, viz:

* * * * * * *

S. M. CLYATT
vs.
THE UNITED STATES. } No. 1151.

November term, 1903.

MARCH 16, 1904.

(Extract from minutes.)

S. M. CLYATT
vs.
THE UNITED STATES. } No. 1151.

On this day this cause was regularly called, and after argument by W. M. Hammond, Esq., and Lionel Adams, Esq., for plaintiff in error, and W. W. Howe, Esq., for defendant in error, was continued for further hearing until tomorrow.

November term, 1903.

MARCH 17, 1904.

(Extract from minutes.)

S. M. CLYATT
vs.
THE UNITED STATES. } No. 1151.

On this day this cause was called for further hearing, and after argument by Lionel Adams, Esq., for plaintiff in error, was submitted to the court.

November term, 1903.

MARCH 29, 1904.

(Extract from minutes.)

SAMUEL M. CLYATT
vs.
THE UNITED STATES. } No. 1151.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Florida, and was argued by counsel.

Whereupon, the court desiring the instruction of the honorable, the Supreme Court of the United States for the proper decision of the matters pending in this cause, orders that the following three

questions and propositions of law be certified to the said Supreme Court in accordance with the provisions of sec. 6 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the circuit courts of the United States and for other purposes; approved March 3, 1891, to-wit:

1. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States?

2. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States when at the time of the arrest and return of such person, there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage.

3. Do the acts and conduct of the defendant as charged in the indictment constitute the offence of holding, arresting or returning to a condition of peonage within the purview of sec. 5526 of the Revised Statutes?

And it is further ordered that a printed copy of the transcript of the record in the above styled and numbered cause, properly identified by the clerk of this court, be transmitted with the certificate herein.

Filed March 29, 1904. Charles H. Lednum, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

SAMUEL M. CLYATT, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error. } No. 1151.

Error to the circuit court of the United States for the northern district of Florida.

Before Shelby, circuit judge, and Maxey and Jones, district judges.

Statement of the Case.

On November 21, 1901, at a term of the United States circuit court for the northern district of Florida, the grand jury of that court, duly sworn and organized, found and presented the following indictment:

"In the Circuit Court of the United States for the Northern District of Florida, in the Fifth Judicial Circuit.

"The grand jurors of the United States of America, empaneled

and sworn within and for the district aforesaid, on their oaths present, that one Samuel M. Clyatt, heretofore, to-wit: on the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did, then and there, unlawfully and knowingly return one Will Gordon and one Mose Ridley *to a condition* of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley returning them the said Will Gordon and Mose Ridley to work to and for Samuel M. Clyatt, D. T. Clyatt and H. H. Tift, co-partners doing business under the firm name and style of Clyatt and Tift, to be held by them the said Clyatt & Tift to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"2nd. And the grand jurors aforesaid, on their oaths aforesaid, do further present, that one, Samuel M. Clyatt, heretofore, to-wit: on the eleventh day of February, in the year of our Lord one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid and within the jurisdiction of this court, did, then and there, unlawfully and knowingly cause and aid to be returned Will Gordon and Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and Mose Ridley, causing and aiding them the said Will Gordon and Mose Ridley to be returned to work to and for Samuel M. Clyatt, D. T. Clyatt and H. H. Tift, co-partners doing business under the firm name and style of Clyatt & Tift to work out a debt claimed to be due to them the said Clyatt & Tift by them, the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"JOHN EAGAN,
United States Attorney."

"Indorsements: A true bill, Edward B. Eppes, foreman."

The defendant, Samuel M. Clyatt, was brought to the bar, and after hearing the indictment read, pleaded "Not guilty." Whereupon, a jury was duly empaneled, and after hearing the evidence, argument of counsel and charges of the court, returned the following verdict: "We, the jury, find the defendant guilty, so say we all." Whereupon, the defendant Samuel M. Clyatt was remanded to jail to await the further order of the court.

After verdict, and before sentence, the defendant, by his attorneys, moved the court to arrest the judgment, and that he be discharged and allowed to go without delay, on the following grounds:

"1st. That the statute under which this indictment is found, to-wit: section- 1990 and 5526 of the Revised Statutes of the United States, do- not apply to the charges made against this defendant in the indictment or to the evidence in support of the same.

"2nd. That there was no proof whatever of any peonage previous to, or subsequent to the finding of the indictment, on Mose Ridley or Will Gordon inflicted or caused to be inflicted by this defendant, supporting the offense of peonage as charged in this indictment.

"3rd. That the offense of peonage as defined in the statute and the punishment therefor as defined and provided in the sections 1990 and 5526 of the Revised Statutes of the United States, if constitutional, which is denied, was never made applicable to the fact stated and proven in the indictment and such offenses as were proven are cognizable only in the State courts, no Federal jurisdiction appears in this cause.

"4th. No system of peonage is charged or proven to have been in evidence within this jurisdiction.

"5th. The proof of an existing custom not charged in the indictment to exist in Levy county, Florida, or in any other locality, could not supply the absence of any proof as to the return of Gordon and Ridley to a condition of involuntary servitude."

After hearing the motion, the circuit court made the following order: "The United States *vs.* Samuel M. Clyatt. Peonage. The motion in arrest of judgment by the defendant is hereby overruled."

And, thereupon, on March 27, 1902, the circuit court entered the following judgment: "The United States *vs.* Samuel M. Clyatt. Indictment, violation section 5526 Rev. Statutes of U. S.

"And now at this time came the United States, by John Eagan, United States district attorney for the northern district of Florida, who prayed the judgment of the court upon one Samuel M. Clyatt, heretofore convicted before this court of a violation of section 5526 of the Revised Statutes of the United States, and the said defendant being brought into court, and the court being fully advised in the premises, ordered the said defendant to the bar of the court and imposed the following sentence:

"It is ordered and adjudged that the said defendant, Samuel M. Clyatt be taken hence to the Federal penitentiary at Atlanta, in the State of Georgia, and there confined at hard labor for the full term and period of four years from the 27th day of March, A. D. 1902, and that he stand committed until the terms of this sentence be complied with, or until he be discharged by due course of law."

And afterwards, on March 27, 1902, defendant Samuel M. Clyatt by his attorneys, duly applied for and obtained a writ of error to the United States circuit court of appeals for the fifth circuit, and made the following assignment of errors.

"Comes now the defendant, Samuel M. Clyatt, and makes the following assignment of errors:

"1. The court erred in overruling the motion of defendant for the arrest of the judgment in this cause upon the several grounds alleged therein.

* * * * * * *

"3. Sections 1990 and 5526 of the Revised Statutes of the United States, under which the defendant was tried and convicted, are not applicable to this case. There is no allegation or proof of the existence of any system of peonage anywhere in the States of Florida or Georgia.

"4. There is no allegation that any act, law resolution, orders, regulations or usages, which had been before established, maintained or enforced, is charged in the indictment or that by virtue of any of these an attempt has been made in this case to established, maintain, and enforce, directly or indirectly, the voluntary or involuntary service or labor of any person as peons in liquidation of any debt or obligation, or otherwise, and there is no proof against this defendant of having done so, or of having assisted in the arrest or return of Gordon and Ridley to any condition of peonage.

"5. The statutes were made and intended to be applied to a system in existence in the Territory of New Mexico and not extended to any State wherein the system then existing in New Mexico did not obtain."

Thereafter the circuit court made an order granting the defendant leave to file a supersedeas bond in said cause. The bond was duly filed and approved.

This cause having come on for hearing in this court, was argued by the attorneys for the plaintiff in error and by attorneys for the United States; whereupon, this court, desiring the instruction of the honorable Supreme Court of the United States for proper decision of the matters pending, certifies to said Supreme Court the following questions, to-wit:

1. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States?

2. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States when at the time of the arrest and return of such person, there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage.

3. Do the acts and conduct of the defendant as charged in the indictment constitute the offence of holding, arresting or returning to a condition of peonage within the purview of sec. 5526 of the Revised Statutes?

For further certainty and information a printed copy of the transcript is transmitted with this certificate.

United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 34 pages, numbered from *a* to 33, inclusive, contain a true copy of the record and all proceedings had, including statement and questions certified, in the case of Samuel M. Clyatt, plaintiff in error, *versus* The United States, defendant in error, No. 1151, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 23rd day of May, A. D. 1904.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. ~~659~~. 235.

SAMUEL M. CLYATT

vs.

THE UNITED STATES.

UPON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR AN ORDER TO SEND UP ENTIRE RECORD.

W. G. BRANTLEY,
Counsel for Samuel M. Clyatt.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10961

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 659.

SAMUEL M. CLYATT

vs.

THE UNITED STATES.

UPON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR AN ORDER TO SEND UP ENTIRE RECORD.

Now comes said Samuel M. Clyatt, by his counsel, and moves for an order of this honorable court, directed to the honorable judges of the United States circuit court of appeals for the fifth circuit, commanding said judges to forthwith transmit to this honorable court the entire record and proceedings in said cause, so that this honorable court may act thereon as of right and according to the law ought to be done.

Said cause being before this honorable court on a certifi-

cate for instructions, the entire record should be brought up, for the following reasons:

1st. Because, in order to answer the first and third questions propounded by the honorable court of appeals, this honorable court should know to what State these questions relate. The indictment in this case would clearly indicate that the State of Florida is the State referred to, while the record will show that the evidence offered by the Government and on which the plaintiff in error was convicted all relate to the State of Georgia as the State to which the parties named in the indictment were returned to be held in an alleged condition of peonage.

2d. Because the third question propounded cannot be answered in the absence of the record showing what were the acts and conduct of the plaintiff in error that were held by the honorable district court to constitute "returning to a condition of peonage," as charged in the indictment.

3d. Because each of the three questions propounded by the honorable circuit court of appeals purports to be limited to section 5526 of the Revised Statutes, while the motion of the honorable Attorney General to advance the hearing recites that the plaintiff in error was convicted of violating sections 1990 and 5526 of the Revised Statutes, and in order that a correct understanding of the questions may be had and this honorable court may determine whether the record upon which the defendant was convicted shows or sets forth matter constituting a violation of sections 1990 and 5526 of the Revised Statutes, or either of them, within the meaning of the same, the entire record should be before this court for its inspection.

4th. Because neither section 5526 nor 1990 defines a "system of peonage" or a "condition of peonage," and therefore it is necessary to a correct understanding of each of the ques-

tions to know in detail the acts and conduct of the plaintiff in error, so that this honorable court may determine whether the same constituted a violation of the law of the United States "within the meaning" of section 5526, as inquired by the circuit court of appeals.

5th. Because a correct understanding of the true intent and meaning of sections 5526 and 1990 cannot be had without construing the act of Congress, approved March 2, 1867, entitled "An act to abolish and to forever prohibit the system of peonage in the Territory of New Mexico and other parts of the United States," from which act the said two sections were taken; and, in construing this act, its applicability or non-applicability to the acts and conduct of the plaintiff in error and its pertinency to the questions propounded can only appear by reference to the entire record in said cause.

6th. Because the indictment, which is before the court, charges the plaintiff in error with returning and causing and aiding to be returned to a condition of peonage certain parties named therein, and the questions propounded each relating to this alleged condition of peonage, it is necessary to a correct understanding of the questions to know what the condition of these parties named in the indictment was prior to and subsequent to their being so returned to it, and this condition can only be ascertained by reference to the entire record.

7th. Because the questions propounded are new and important, and in order that their full force and meaning may be fully comprehended, all the facts prompting and suggesting them should be before this court.

8th. Because the entire record is short, as is here to the court shown, and the plaintiff in error believes it is necessary to the complete vindication of his rights that the same should

be considered in connection with the questions propounded by the honorable circuit court of appeals, and likewise believes that in the interest of justice the whole record and cause should be laid before this honorable court and the whole matter in controversy decided in the same manner as if it had been brought up for review by writ of error or appeal.

9th. Because the facts that were in evidence on the trial had in the United States circuit court for the northern district of Florida were by direction of the then United States district attorney for said district included in and made a part of the record as transmitted to the United States circuit court of appeals and were freely discussed and treated as a part of the record both by the United States district attorney and by the attorneys for plaintiff in error in argument before the circuit court of appeals, and were necessarily considered by said circuit court in connection with all other questions raised upon the record, and plaintiff in error submits that it is indispensable to a clear and proper apprehension by this honorable court of the acts and conduct referred to in the "certificate for instructions" that all the evidence touching the same be considered, to the end that the applicability of the act of Congress of March 2, 1867, to the acts and conduct of plaintiff in error may be rightly determined.

10th. Because for a full understanding of the questions propounded by the circuit court of appeals, and for a proper decision by said court of the matter pending before it, it is desirable that a transcript of the entire record in that court should be open to the inspection of this honorable court.

A certified copy of the entire record accompanies this motion.

Respectfully submitted.

W. G. BRANTLEY,
Counsel for Samuel M. Clyatt.

To the HONORABLE ATTORNEY GENERAL OF THE UNITED STATES:

Please take notice that on Tuesday, the 31st day of May, 1904, at the opening of the court, or as soon thereafter as counsel can be heard, the foregoing motion will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of said motion and reasons in support of same.

W. G. BRANTLEY,
Counsel for Samuel M. Clyatt.

Service of the foregoing motion and copy of same acknowledged this 24th day of May, 1904.

M. D. PURDY,
Assistant Attorney General.

SUPREME [illegible]

No. 23[illegible]

SAMUEL M. [illegible]

v.

THE UNITED STATES.

VERDICT AND JUDGMENT AND APPEAL FROM THE U[illegible]
STATES CIRCUIT COURT, SITTING FOR THE [illegible]
DISTRICT OF FLORIDA, TO THE CIRCUIT COURT OF A[illegible]
PEALS FOR THE UNITED STATES, [illegible]
CERTIFICATE FOR INSTRUCTIONS FROM SAID
COURT OF APPEALS FOR THE UNITED STATES [illegible]
CUIT, TO THE SUPREME COURT OF THE UNITED [illegible]

BRIEF FOR PLAINTIFF IN ERROR.

W. M. [illegible],
Attorney for Plaintiff in Error.

W. G. Brantley,
A. O. Bacon,
Of Counsel.

Judd & Detweiler, Printers, Washington, D. C. 1894

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 235.

SAMUEL M. CLYATT

vs.

THE UNITED STATES.

VERDICT AND JUDGMENT AND APPEAL FROM THE UNITED STATES CIRCUIT COURT, SITTING FOR THE NORTHERN DISTRICT OF FLORIDA, TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES, FIFTH CIRCUIT, AND CERTIFICATE FOR INSTRUCTIONS FROM SAID CIRCUIT COURT OF APPEALS FOR THE UNITED STATES, FIFTH CIRCUIT, TO THE SUPREME COURT OF THE UNITED STATES.

Brief of W. G. Brantley, of Counsel for Samuel M. Clyatt, Plaintiff in Error.

STATEMENT OF THE CASE.

On November 21, 1901, Samuel M. Clyatt, plaintiff in error, was indicted in the United States circuit court for the northern district of Florida for an alleged violation of sections 1990 and 5526 of the Revised Statutes of the United

States, known as the peonage statutes. The charging part of the first count in the indictment (page 2 of the record) was:

"* * * did then and there unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and the said Mose Ridley, to work to and for Samuel M. Clyatt, D. T. Clyatt and H. H. Tift, co-partners doing business under the firm name and style of Clyatt and Tift, to be held by them, the said Clyatt and Tift, to work out a debt claimed to be due to them, the said Clyatt and Tift, by the said Will Gordon and Mose Ridley. * * *"

The charging part of the second count in the indictment is that the said Samuel M. Clyatt did "* * * unlawfully and knowingly cause and aid to be returned Will Gordon and Mose Ridley to a condition of peonage" in manner and form as described in the first count.

The plaintiff in error was thereafter tried and convicted upon said indictment and sentenced to four years' imprisonment in the penitentiary. On March 26, 1902, he submitted a motion for new trial on the grounds therein stated (page 5 of the record), and on March 27, 1902, he submitted a motion in arrest of judgment on the grounds therein stated (page 6 of the record), and on the same day applied for and obtained a writ of error from the United States circuit court of appeals for the fifth circuit. The cause was thereafter argued by counsel for both sides in said circuit court of appeals; whereupon that court certified three questions to the Supreme Court, as follows:

1. "Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor, to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States?"

2. "Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States, when at the time of the arrest and return of such person, there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage?"

3. "Do the acts and conduct of the defendant, as charged in the indictment, constitute the offense of holding, arresting, or returning to a condition of peonage, within the purview of section 5526 of the Revised Statutes?"

On May 31, 1904, the plaintiff in error, by his counsel, filed in this honorable court a petition, on the grounds therein stated, for an order directed to the honorable judges of the United States circuit court of appeals for the fifth circuit, commanding said judges to forthwith transmit to this honorable court the entire record and proceedings in said cause. It was later announced by this honorable court that said motion would be considered in connection with the main case.

The Evidence.

If the several questions propounded to this honorable court should each be answered against the contentions of the plaintiff in error, Clyatt, he would nevertheless be entitled to his freedom, for he was not proven to have committed any violation of sections 1900 and 5526 under any possible construction of these sections; hence the importance of having the entire record in his case considered, and such consideration is evoked in pursuance of section 6 of the act of March 3, 1891, establishing circuit courts of appeals, and application for such consideration was made in accordance with rule 37 of this honorable court.

The third question certified calls for an inspection of the

indictment in the case, and this in itself brings the transcript of the record before the court, and, being brought for this necessary purpose, the entire record, on the broad principles of justice, being before the court, should be, for each of the reasons named in our motion, considered and passed upon in its entirety. We ask, in the language of the act of 1891, just hereinbefore cited, that this honorable court "decide the whole matter in controversy in the same manner as if it had been brought there (here) for review by writ of error or appeal."

Viewing the evidence shown in the record in its most unfavorable light for the plaintiff in error, it fails to establish, either directly or indirectly, the "return" or "holding" by him of the parties named in the indictment to any "servitude," "labor," or "peonage" of any character or description. It wholly fails to show that the parties named were returned to work to and for S. M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt and Tift, as charged in the indictment. It even fails to show that such a copartnership existed. It fails to show that such copartnership, even if it existed, or any member thereof, had ever at any time held the parties named or any other party or parties in a state or condition of peonage, or to any service or labor whatever. The most that can be claimed, the evidence establishes, is an unlawful "arrest," and that only technically unlawful, as warrants issued in Georgia charging the offense of larceny were used in making the "arrest," though made in Florida, and the actual arrests were made by a deputy sheriff of the State of Florida (pages 13 to 20 of the record).

James R. Dean testified that Gordon and Ridley, the parties named in the indictment, were working for him in Alachua county, Florida, when arrested; that they were arrested by Mr. Yearty, deputy sheriff, under warrants, and that Mr. Yearty was accompanied by plaintiff in error Clyatt and others. He said: "I do not know where Gordon and Rid-

ley, the two negroes that were taken from my place, are now. I have never seen them since" (pages 14 and 15 of the record). They were arrested and carried away one night, and Mr. Dean never saw them afterwards.

Mr. Yearty, deputy sheriff, testified (page 16 of the record) that he made the arrest on Georgia warrants, thinking he had the right to do so. He left Mr. Dean's place with Gordon and Ridley, leaving plaintiff in error Clyatt to come on behind him. He said (page 17 of the record): "I told Mr. Clyatt that Gordon and Ridley would rather go to Georgia with him than to go to jail at Bronson, where I would certainly have carried them, but for their preference to go to Georgia with Clyatt. Clyatt said if they wanted to go along with him, he was perfectly willing to carry them. They got aboard the train." Yearty never saw them any more.

E. T. Ford testified that Gordon and Ridley, after their arrest, were carried to Tifton, Georgia, by plaintiff in error Clyatt and himself; says they were not handcuffed (page 19). He said: "I never saw Gordon or Ridley any more after they got off the train at Tifton and we took them to defendant's house" (page 19 of the record).

So far as the record discloses, the first time Gordon and Ridley were seen was the night they were arrested at James R. Dean's place in Alachua county, Florida, and the last time they were seen was by the witness Ford, who saw them last the night of their arrival at Tifton, Georgia. That they were brought directly from Florida to Georgia was established, but whether they were put upon trial after their arrival in Georgia and convicted or acquitted, or whether they were liberated or put to work by the plaintiff in error Clyatt or by some one else, is not disclosed.

The important fact is that no evidence was offered to show that the plaintiff in error Clyatt detained or controlled them in a condition of "peonage" or under a system of peonage, or detained them in any way after they were returned to Georgia.

No proof of any "act, law, resolution, order, regulation, or usage" of the State of Georgia or of the State of Florida whereby "peonage" is permitted or practiced was shown, but, as an attempt presumably to do this, the following testimony was offered:

The witness James R. Dean, over the objection of defendant's counsel, was asked (page 14 of the record): "Mr. Dean, is it a general custom among turpentine men to swear out warrants for hands when they go away owing debts and have them arrested and returned?" to which he answered (page 14): "I do not know of the custom to swear out warrants. I never took out warrants myself." Also the witness H. S. Sutton, sheriff of Levy county, Florida, was asked (page 15 of the record): "Mr. Sutton, is it a general custom among turpentine men in Florida and Georgia to have negroes arrested in this way?" to which he answered (page 16): "It has been the universal custom of the turpentine men in Georgia and Florida to go and take negroes whenever they wanted to in this way."

The question was objected to by the plaintiff in error Clyatt. It will be observed that the indictment (page 2 of the record) does not charge that Gordon and Ridley were returned to work to and for Clyatt and Tift to work out a debt, *as peons, or under a contract made by them in pursuance of any law or custom authorizing peonage.* It does not charge the existence of any system of peonage by law, custom, or otherwise. It does not specify the place by town, county, or State where Clyatt and Tift were engaged in business and to which the said parties were returned, or that Clyatt and Tift worked or controlled any persons under any form of peonage. It charges the defendant with having returned the named parties to a condition of peonage, and then specifies how it was done, to wit, by returning them to work out a debt claimed to be due to Clyatt and Tift. Clearly, therefore, the question to Sutton and his answer thereto should have been excluded, for, the indictment failing to

charge the existence of any system of peonage by law, custom, or otherwise, any evidence relating thereto was irrelevant and inadmissible. If proof of such a law or custom was an essential ingredient of the offense of "peonage," and it undoubtedly was, the same should have been charged in the indictment (105 U. S., 612; 1 Bishop's New Cr. Proc., sec. 624, 1). Not being charged in the indictment, proof of same could not be offered.

If the proper foundation for the question and answer had been laid, the answer which furnished the sole and only evidence found in the record tending even to show the existence of any system of labor, by custom or otherwise, was wholly insufficient for the purpose of showing the existence of "peonage." "To go and take negroes this way," to wit, by arrest under warrant for larceny, is not a system of labor. The answer of Sutton does not show any custom of labor, service, or servitude. It gives no intimation as to how few or how numerous were the "turpentine men" of Georgia and Florida, so as to give a general idea of how general the custom referred to was. It gave no information as to whether the custom of "taking" negroes "this way" was practiced openly or secretly, whether with or without the knowledge of the State authorities, or whether in pursuance of law or in violation of law. The custom of one class of people is not the custom of the whole people. There could be no legal inference or conclusion that because "turpentine men" pursued a certain custom that the plaintiff in error Clyatt pursued such a custom.

The important fact appearing, also, that Gordon and Ridley were promptly taken from Florida to Georgia, whatever the "system" or "condition" to which they may have been returned, it existed in Georgia. They were "returned" to Georgia. Their mere seizure or arrest in Florida and immediate deportation from that State did not constitute a "returning" to anything in Florida. The evidence is full and uncontradicted that they were not "returned" to or

"held" to any servitude in Florida. The record is silent as to what was done with them in Georgia, but it is positive and direct that they were not returned to Clyatt and Tift in *Florida* to work out a debt in *Florida*. The evidence is positive that they were not returned to a condition of peonage in *Florida*. It follows, therefore, that the plaintiff in error Clyatt was not proven gullty of violating sections 1900 and 5526 of the Revised Statutes in either Georgia or Florida, under any possible construction of these statutes and regardless of how the questions certified by the circuit court of appeals may be answered; and least of all was he shown guilty of violating these sections of the Revised Statutes *in Florida*. The court there was without jurisdiction, even though the offense had been shown committed.

Section 2399 of the Revised Statutes of Florida prohibits the forcible removal, or any sort of removal, of any citizen of the State beyond its limits, and for such offenses prescribes a punishment of ten years in the State penitentiary. If the plaintiff in error violated any law in removing Gordon and Ridley from Florida this was the law he violated, and not the anti-peonage laws.

The Questions Certified by the Circuit Court of Appeals.

The first question asks if the returning of a person to the custody of his creditor, to be by him held against the will of the debtor, to labor to pay the debt, is a violation of section 5526 of the Revised Statutes. The second question repeats the first and adds thereto: "when at the time of the arrest and return of such person there existed in the State to which he was returned to be so held, no statute of the State, or usage therein creating or sanctioning peonage or a system of peonage." The absence from the first question of this addition thus made to the second question leaves us to presume that the first question relates to a condition or situation in the State to which the debtor is returned, where,

by statute or usage, peonage does exist, as otherwise the questions would be the same. The third question is in effect the same as the second, for the only acts and conduct of the defendant charged in the indictment are that he returned against their will and forcibly and unlawfully certain parties to their creditors to work out a debt, there being no allegation that this was done in pursuance of any law or usage creating or sanctioning peonage or a system of peonage, and we have to conclude that the charge made in the indictment presupposed the non-existence of any statute or usage creating or sanctioning peonage or a system of peonage.

The word "unlawfully" is used in the first question. The question is: "Is the act of *unlawfully* and forcibly arresting and returning a person," etc. This would presuppose a violation of law in the arrest and return of the person, and that such "arrest" and "return" was without the sanction of any law. It is to be supposed, however, that the questions desired to be settled by the circuit court of appeals were: First. "Is the act of forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor to labor to pay the debt a violation of section 5526 of the Revised Statutes, where it appears that at the time of the arrest and return of such person, there existed in the State to which he was returned to be so held, a statute of the State or usage therein creating or sanctioning peonage, or a system of peonage?" In other words, would such an arrest and such detention to work out a debt, without more, constitute peonage, there being a law or usage creating or sanctioning peonage?

The second question is as heretofore stated and seeks to ascertain if such an arrest and such a detention to work out a debt would constitute a violation of the anti-peonage law found in section 5526 of the Revised Statutes, there being no law or usage in the State where the party is held creating or sanctioning peonage or a system of peonage. The

second question, if we have thus stated them correctly, is the only one of real importance, for we submit without fear of successful contradiction that there cannot be found any law or usage creating or sanctioning peonage or a system of peonage in Florida or Georgia or in any State of the Union.

We submit, however, that, assuming such a law or usage to exist, the first question should be answered in the negative, and for the simple reason that it requires something more than the forcible return of a debtor to a creditor to work out a debt to constitute the "condition of peonage" referred to in section 5526 of the Revised Statutes. We submit that the second question and likewise the third, which we have shown is included in the second question, should each be also answered in the negative.

The reasons for each of these suggestions will appear in the citations of authorities and argument to follow.

The Anti-Peonage Law.

In the Revised Statutes we find that sections 1990, 1991, 5526, 5527, and 5532 all deal with this law, but as each of these sections is based on the act of March 2, 1867, found in chapter 187, page 546, of volume 14, United States Statutes at Large, it is well for convenience of reference to quote this act in full, as follows:

"An act to abolish and forever prohibit the system of peonage in the Territory of New Mexico and other parts of the United States.

"*Be it enacted, etc.*, That the holding of any person to service or labor under the system known as 'peonage' is hereby declared to be unlawful and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States, and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United States, which have heretofore established,

maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary, or involuntary service or labor of any persons as peons in liquidation of any debt or obligation, or otherwise, be and the same are hereby declared null and void; and any person or persons who shall hold, arrest, or return, or cause to be held, arrested, or returned, or in any other manner aid in the arrest, or return of any person or persons to a condition of peonage, shall, upon conviction, be punished by fine not less than $1,000 nor more than $5,000, or by imprisonment not less than one, nor more than five years, or both, in the discretion of the court.

"SEC. 2. *And be it further enacted*, That it shall be the duty of all persons in the military or civil service in the Territory of New Mexico to aid in the enforcement of the foregoing section of this act; and any person or persons who shall obstruct, or attempt to obstruct, or in any way interfere with or prevent the enforcement of this act shall be liable to the punishments and penalties hereby provided, and any officer or other person in the military service of the United States who shall so offend, directly or indirectly, shall on conviction before a court-martial be dishonorably dismissed from the service of the United States, and shall thereafter be ineligible to reappointment to any office of trust, honor, or profit under the Government.

"Approved March 2d, 1867."

With this law before us, we find it more or less ambiguous in that it does not define the words "peon" and "peonage." If we turn to the lexicographers we find the following definitions:

The Standard Dictionary defines "peon" as follows:

"A common laborer; a servant, specifically in Spanish America, one who is bound to serve his creditor until the debt is paid."

And defines "peonage" as "the state of a peon."

Webster's Dictionary defines "peon:"

"A day laborer; a servant; especially in some of the Spanish-American countries, a debtor held by his creditor in form of qualified servitude to work out a debt."

And defines "peonage" as "the condition of a 'peon.'"

Worcester's Dictionary defines "peon" as:

"In Mexico, a day laborer; usually a laborer held in servitude until a debt is discharged; a bondsman for debt."

And defines "peonage:"

"The state of 'peons.' Slavery as it exists in Mexico."

The Century Dictionary defines "peon:"

"A day laborer; specifically in Spanish America a species of serf compelled to work for his creditor until his debts are paid."

And defines "peonage" as:

"A form of servitude existing in Spanish America. It prevailed especially in Mexico."

Black's Law Dictionary (edition A. D. 1891) defines "peon" as follows:

"In Mexico a debtor held by his creditor in a qualified servitude to work out the debt; a serf. In India, a footman, a soldier, an inferior officer, a servant employed in the business of the revenue, police, or judicature."

Anderson's Dictionary of Law (edition 1889) defines "peonage" as follows:

"The state or condition of a peon. In Mexico, a debtor held in servitude until he has worked out his debt."

With these several definitions and with the act of March 2, 1867, standing isolated and alone, separate and distinct from all the other acts of Congress, we are justified by well-settled rules of construction to resort to the circumstances surrounding the passage of this act in order to ascertain the defect or mischief which the act was intended to remedy (148 U. S., 490). Proceeding thus we have—

The History of the Legislation.

A reference to the proceedings of the Senate at the second session of the Thirty-ninth Congress, found in the *Congressional Globe*, volume 38, part 1, page 239, on January 3, 1867, shows that Mr. Sumner offered this resolution:

"*Resolved*, That the Committee on the Judiciary be directed to consider if any further legislation is needed to prevent enslavement of Indians in New Mexico, or any system of peonage there, and especially to prohibit the employment of the Army of the United States in the surrender of persons claimed as peons."

A letter from N. H. Davis, Assistant Inspector General United States Army, was read as follows:

"LAS CRUCES, *August* 22, 1865.

"The commanding officer of Fort Selden will allow and assist, if necessary, the bearer, Don Pedro Garcia, and retain and take in his charge his peon, Antonio Rodriguez, at said post.

"By command of General Carleton.

"N. H. DAVIS,

"*Assistant Inspector General United States Army.*"

A further letter from General Davis specifically ordering Capt. J. H. Whitlock, commanding Fort Selden, N. Mex., among other things, as follows:

"You are hereby directed so far to aid in the rendition of peons, when claimed by their masters, or there is a reasonable cause to believe that they have deserted them, as not to allow them to remain on the military reservation."

* * *

was read.

These letters were claimed as justification for the resolution, and the evil complained of in the discussion this day was limited solely to New Mexico. The resolution, after de-

bate, was referred, by unanimous consent, not to the Committee on the Judiciary, but to the Committee on Military Affairs (see p. 241), showing that the object of the Senate was to get at the army officers who were assisting in upholding peonage.

On January 26, 1867 (see *Congressional Globe*, vol. 38, pt. 2, p. 764), in the proceedings of the Senate, Mr. Wilson asked and by unanimous consent obtained leave to introduce a bill (S. 543) to abolish and forever prohibit the system of peonage in the Territory of New Mexico and other parts of the United States, and the same was referred to the Committee on Military Affairs and Militia.

On January 28, 1867 (see p. 789, same volume), Mr. Wilson, from the Committee on Military Affairs, reported the bill with an amendment.

On February 19, 1867 (vol. 38, pt. 3, p. 1571, of the *Congressional Globe*), Mr. Wilson called up the bill, offered a substitute therefor, which substitute is the identical language of the law as it passed. The substitute was adopted and the bill passed. (See p. 1572.)

In this discussion Mr. Wilson was asked to define peonage, and he did so (p. 1571). He said:

"It is a condition of modified servitude which we have inherited from Mexico. It exists in New Mexico at this time, the only part of the country where I know it does exist. In some cases it is voluntary, but in most cases, forcible. In the larger towns it is disappearing, but in a portion of the country it still exists, and what is more, officers of the United States, military and civil, have been carrying it out. The object of this bill is to arrest it—to make it the duty of the civil and military officers of the United States to put an end to the system, and not support it. * * * It is a system of modified servitude which is carried on to a great extent in New Mexico, and especially to a lamentable extent with the Indians. A great many Indians are captured and forcibly held in servitude."

Mr. Lane (p. 1571) gave this definition:

"By the laws of Mexico, which were existing in New Mexico at the time of the conquest, peonage was established. The system was simply this, as I understood it, that where a Mexican owed a debt, his creditor had a right to his labor and services until the debt was paid. The debtor became a domestic servant, and he and his family were supported by the creditor, and the peonage never ended until the debt was discharged. It was a kind of servitude for debt which the committee thought was inconsistent with our institutions. We simply say by this bill that peonage shall be abolished, and the creditor shall be left to all his legal means of collecting his debt, but he shall not hold the peon in slavery."

Mr. Lane further said:

"If the Senator will pardon me one moment, I will say that the creditor cannot sell the peon, but he can transfer him like he would a mule or a horse and give his services to anybody else. It is a system of serfdom worse than the Russian system ever was."

Mr. Doolittle said:

"The sum and substance of the testimony was that probably there were about 2,000 Indians in New Mexico held under that system. But, sir, you will recall the testimony of Judge Benedict, the chief justice of the Territory. He stated that the question having arisen before the United States court in New Mexico upon a *habeas corpus* it was decided that these persons were free, and the court had discharged them upon *habeas corpus*. The court had decided that there was no power in the law of New Mexico which would hold a person against his will in servitude; but he stated as a practical fact that these persons remained in the families and in the service of their former masters or employers. Not knowing their rights, not being in a position to go into court to assert their rights, or not having a desire to do so, they were generally remaining in the families of their masters, and probably there were about two thousand of them in the Territory. * * * Then as to the system of peonage, it is true that by the law of Mexico, before we acquired the Territory of New Mexico, the system of peonage

existed there, a system by which a person indebted to another is compelled specifically to perform labor until the debt is discharged."

"The debtor has the privilege under their law of hiring himself out to another man; to get another man or master, if you please, to purchase the debt, and then he goes along with his debt to another master, but as long as the debt remains, he is compelled to serve. According to the custom of that country, with that class of people, in the development of civilization which they have obtained, the practical fact was that almost always when one desired to hire out, the first thing the laborer desired to do was to get in debt to his master, and get in debt as much as he could, and go and live with him. * * * It is a system of serfdom. I understood, however, from the chief justice of the Territory that in the decision which was given by the court they had decided against the power to hold these persons against their will. They were not compelled to remain any longer than they desired to remain, but, as a practical fact, they do reside with the landholders throughout New Mexico to a considerable extent."

Mr. Buckalew (p. 1572) said:

"There is no doubt of our jurisdiction in New Mexico to enact such a law as the one proposed. I have some knowledge of this system, and I think the necessity of this law is evident. Eventually the courts will weed out this system in that Territory and do it effectually, but it will remain lingering there for a considerable time, unless Congress shall interpose by a law of this kind. Upon the publication of such a statute in that Territory, the whole system will fall to the ground at once."

When we turn to the proceedings of the House, we find that on March 2, 1867, this bill was, upon motion of Mr. Bingham, put upon its passage and passed without debate and without division.

Peonage.

A still better and more specific definition of peonage and of the "system" of peonage can be found described in the case of Jaremillo *vs.* Romero, 1st New Mexico Reports, 190. This decision was rendered in January, 1857. This decision (p. 194) informs us that "upon the entry of the power of the United States within the Territory in 1846, and establishing their rule and government, there was found a large class of persons commonly designated in the language of the country by the name of peons. They were not of any particular color, race or caste of the inhabitants. They appeared as servants, menials, or domestics 'bound' to some kind of 'service' to their masters. * * * One fact existed universally, all were indebted to their masters. This was the cord by which they seemed bound to their master's service." The court further informs us on the same page that the peon "could not abandon the service, and if he did, his master pursued, reclaimed and reduced him to obedience and labor again; and the alcaldes of the country in the most summary manner, aided the master in bringing back his fugitive." The opinion also (pp. 198 and 199) sets out the legislative act of 1851 of the Territory describing the relations of master and servant, in which this section occurs: "When a servant runs off, his master may present himself before any authority and take out a warrant of his debt and with it may proceed in person or otherwise to any part of the Territory and make his claim, which shall be attended to according to law." The opinion (on page 204) further cites a further territorial act passed in 1852, and says: "We see in this section the exertions of the legislature to make more strict and multiply the remedies for the enforcement of these descriptions of contracts. They modify in some respects the act of 1851. By that the servant could leave his master whenever he willed by paying his debt. By this he must abide

by and fulfill his agreement according to its terms, whether he owes, or does not owe, pays or does not pay. Unless he can get his master's consent to rescind or prove some one of the causes specified to procure a cancellation, he may be prosecuted for a failure, and so may the master, and the servant compelled to a compliance by a fine and imprisonment. * * * It defines how he (the servant) may be sued for the debt and judgment obtained in the course of a legal proceeding, and in pursuance of an execution, his services sold by the sheriff to the highest bidder to raise the means to pay the debt." On page 206 the court says: "This system we find to be the peon system of the country." Again, on same page: "In the common use of language the term 'peon' is now used in this country as synonymous with 'servant.'" Also on page 207 the court says: "A peon or servant loses none of his rights as a citizen by contracting with a master to serve him. He is under no political disqualifications; he votes at all elections, if otherwise legally qualified; his servitude does not render him under our laws ineligible to the offices of the precinct, the county, the legislature, or delegate in Congress."

Construction of the Act of 1867.

Construing this act in the light of the legal definition of peonage found and of the lexicographer's definitions and of the Senate debates preceding its passage, we conclude:

1st. That "peonage" is a legal status.

2d. That a "condition of peonage" mentioned in section 5526 includes a "system of peonage," a contract of service under this "system," and a debt as the basis of the contract, and that a "return to a condition of peonage" means a return to labor or service as a peon, under the system in pursuance of this contract, in liquidation of this debt.

3d. That the "peonage" referred to is defined by Congress in said act by the reference therein to the "laws" of New Mexico, and is further likewise defined in the Senate debates. It was "peonage" as practiced in New Mexico that Congress had in mind.

4th. The title of the act is: "To ABOLISH AND FOREVER PROHIBIT "*the*" SYSTEM OF PEONAGE IN THE TERRITORY OF NEW MEXICO AND OTHER PARTS OF THE UNITED STATES."

It is, therefore, "*the*" system of peonage practiced in New Mexico that is abolished in New Mexico and elsewhere in the United States.

5th. It was this "system" that was abolished and prohibited. It was not individual acts that were legislated against.

6th. The act does three things: First, it makes the "system" of peonage unlawful and abolishes and prohibits the "system" in all the States and Territories; second, it makes null and void in New Mexico and in all the States and Territories "all acts, laws, resolutions, orders, regulations, or usages" then or thereafter established by which the voluntary or involuntary service or labor of persons as peons in liquidation of a debt or obligation is permitted; and, third, it provides a punishment for holding, arresting, or returning a person to a "condition of peonage."

Construing the act as a whole, it could not be contended that the second section of same, directing all persons in the civil or military service in the Territory of New Mexico to aid in the enforcement of the first section, could apply to the first and second things that the act does.

Persons in New Mexico could not aid in preventing a "system" of peonage or a "law" authorizing peonage from existing in the several States. They were, therefore, directed

to aid in enforcing the law only in New Mexico, to wit, the penal or third provision of the law, which provision was intended to apply only to the Territories and specifically intended to apply to New Mexico. Clearly, therefore, the true intent and meaning of this act, so far as the States were concerned, was to prevent them from establishing a "system" of peonage or from enacting, maintaining, or enforcing "laws, resolutions, orders, regulations, or usages" by which peonage could be enforced.

So far as the States are concerned, the act is directed specifically against them as States; the only individuals it is directed against are the individuals in the Territories. That such is the meaning of the act is patent from the reading of it, and that Congress intended no other meaning to be given it is fully and completely shown by the debates preceding its passage.

7th. The act does not make void any law, regulation, usage, etc., by which there is maintained merely the voluntary or involuntary service or labor of a person in liquidation of a debt or obligation. It requires more than this to make the law, regulation, or usage void. The act contains the words "as peons." The thing that is made null and void is the law, regulation, usage, etc., that permits or authorizes persons to be held in voluntary or involuntary service or labor "as peons" in liquidation of a debt or obligation.

8th. "Peonage," it is clear from the act, is something authorized, recognized, or maintained by the State or Territory. An individual cannot create it. Once created by the State or Territory, the individual can "hold" or "return" a person to it or "arrest" a person who has fled from it, and this is the thing that is made criminal for him to do. The act of 1867 abolishes the "system," makes null and void laws then or thereafter enacted that authorize it, and at the same time makes it a penal offense in the Territories

for any person to hold or return a person to the "system" thus abolished.

The act is thus aimed only incidentally at the individual. Its real purpose was to make null and void the laws authorizing the "system" and to abolish the "system," and as a means to that end provision was made to punish the individual. Clearly, therefore, preliminary to punishing the individual, the "system" must be shown as existing, and as existing by virtue of some law or usage maintained or enforced by the State or Territory. An individual acting as an individual and independently of any law, regulation, or usage maintained or enforced by his State or Territory could not be guilty of "peonage." His offense under such circumstances, if he deprived another person of his liberty, would be the invasion of the private rights of one individual by another individual. It would be a private wrong. It would be just such a crime or wrong as the local law of the State might prescribe, and a crime for the local law to punish, and one over which Congress would have no jurisdiction.

9th. It is perfectly manifest that in passing the act of 1867 Congress was not endeavoring to legislate the thirteenth amendment to the Constitution into effect, because:

(*a.*) The terms "slavery" and "involuntary servitude" do not appear in the act.

(*b.*) The act uses the term "voluntary service," which the thirteenth amendment does not authorize.

(*c.*) To the term "voluntary or involuntary service or labor of any persons" is added "as peons," showing that Congress had in mind something different from the "involuntary servitude" named in the amendment.

It is further apparent that the thirteenth amendment was not necessary to give Congress jurisdiction to pass the act,

in so far as same related to New Mexico, because as to all the Territories Congress had plenary power (136 U. S., 42). It is further apparent that the act of 1867 has no reference to African *slavery or the African*. This is shown by the language of the act and by the Senate debates. It is shown by the legal definition of peonage, to the effect that peons were not of any "particular color, race or caste." It is conclusive, therefore, that the thirteenth amendment being directed against African slavery, the same was not invoked to pass the act of 1867.

10th. If "peonage" be neither the "slavery" nor the "involuntary servitude" named in the thirteenth amendment Congress would have no power under the thirteenth amendment or under any other provision of the Constitution to abolish it in the States, and that part of the act of 1867 seeking to abolish it in the States would be void. The thirteenth amendment's ratification was proclaimed by the President December 14, 1865. This amendment was "self-executing" and "by its own unaided force and effect abolished slavery and established universal freedom," so this honorable court has declared. "Slavery," therefore, and "involuntary servitude" were already prohibited and abolished when Congress on March 2, 1867, in the peonage statutes, declared that "peonage" by said act is "hereby" abolished. This act, so far as the States are concerned, added nothing to the force and effect of the thirteenth amendment. The act might be repealed and the States would still be powerless to establish slavery or involuntary servitude. It is not profitable, however, to pursue this discussion, because the record in the case at bar discloses no law or usage in Georgia or Florida creating or sanctioning the system of peonage practiced in New Mexico, or any other system of peonage. The power of Congress, therefore, to abolish such a system in either of these States is not important to the real questions at issue.

Answers to the Questions Certified for Instruction.

From the foregoing analysis of the act of 1867 it is manifest that the first question asking, "Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of section 5526, R. S., assuming there is a statute or usage in the State to which the party is returned, creating or sanctioning peonage," must be answered in the negative:

1st. Because the penal provision of the act of 1867, which is found in section 5526, R. S., from the letter and language of the act of 1867, is directed against individuals in the Territories and not elsewhere.

2d. The question assumes no "contract" of service entered into by the debtor with his creditor prior to the arrest and return, which contract is absolutely essential to a "condition of peonage."

3d. The act of 1867 provides no prohibition or punishment against the "holding" or "returning" of a person to work out a debt unless he be held or "returned" as "a peon." The question does not assume the debtor to be "a peon."

4th. To constitute a violation of the act of 1867 the creditor must proceed under the law or usage of his State or Territory to "reclaim," "hold," and "return" his debtor. He proceeds "lawfully," so far as his State is concerned. The question assumes him to proceed "unlawfully," and his offense, therefore, comes within the police power of his State and not of Congress. He violates no law of the United States.

The second question, which includes the third, must likewise be answered in the negative, for it assumes the nonexistence of any law or usage in the State to which the creditor is returned to labor to work out a debt by which peonage, or a system of peonage, is created or sanctioned. We have demonstrated that "peonage" is a distinct legal status. The particular peonage that Congress legislated against, and the only peonage known to the Congress, was the peonage existing in New Mexico, and that existed by operation of specific statutes. Peonage cannot exist without a law authorizing it. The question assuming no such law to exist, it follows that a person guilty of the acts mentioned in the question would not violate section 5526, R. S.

A Constitutional View of the Act of 1867.

The negative answers suggested to the questions propounded by the honorable circuit court of appeals upon a mere analysis of the act of 1867 are greatly strengthened and fortified by looking at the act from a constitutional standpoint and considering the limitations of power placed upon the Congress by the Constitution.

There being no law, resolution, order, or usage of the State by which "peonage" is maintained, established, or enforced, the act of a citizen in depriving another citizen of his liberty, call the offense "peonage" or any other name, is merely the act of an individual. The wrong is a private wrong and the power to punish for it is vested exclusively in the State. Such punishment comes within the police power of the State, and Congress has no jurisdiction to punish same. Our system of government is a dual one. We have a National Government and a State government. Each has certain powers, duties, and jurisdictions, and each is sovereign in its proper sphere. The Government of the United States is one of enumerated powers. The ninth amendment to the Constitution reads:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The tenth amendment reads:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

Now, specifically as to what powers were reserved by the States and the people and denied to the United States Government by the foregoing amendments, we quote 14 Howard, 17:

"The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, has never been surrendered by the States, or restrained by the Constitution of the United States."

9 Wallace, 41, says:

"No power is conferred by the Constitution upon Congress to establish mere police regulations within the States."

1 Wheaton, 304, 326, says:

"The Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

16 Wallace (Slaughter-house case), 82, says:

"Under the pressure of all the excited feeling growing out of the war our statesmen still believed that the existence of the States, with powers for domestic and local government, including the regulation of civil rights, the rights of persons and of property, was essential to the perfect working of our complete form of government."

92 U. S., 542, seventh head-note, says:

"Sovereignty for the protection of life and personal liberty within the respective States rests alone with the States."

123 U. S., 31, in speaking of the fourteenth amendment, says:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, etc."

95 U. S., 672, says:

"But an act committed within a State for a good or bad purpose, or whether with an honest or criminal intent, cannot be made an offense against the United States, unless it have relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having such relation is one in respect to which the State can alone legislate."

106 U. S., 629 (Harris case), involved the constitutionality of section 5519 of the Revised Statutes. The court held the same unauthorized by the thirteenth, fourteenth, and fifteenth amendments, or by any other provision of the Constitution. The court says (p. 643):

"A private person cannot make constitutions or laws, nor can he with authority, construe them, nor can he administer or execute them. The only way, therefore, in which the private person can deprive another of equal protection of the laws is by commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder. If, therefore, we hold that section 5519 is warranted by the thirteenth amendment, we should, by virtue of that amendment, accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is involved. Thus, under a provision of the Constitution which simply abolished slavery and involuntary servitude, we should, with few exceptions, invest Congress with power over the whole catalogue of crimes."

Again, on page 644, speaking of second section, article IV, of the Constitution, the court said:

"It was never supposed that the section under consideration conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow-citizens conferred by the State of which they were both residents on all its citizens alike."

In 140 U. S., 554, the court said:

"The power of the State to impose restraints and burdens upon persons and property in conservatism and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States and essentially exclusive. In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States and cannot be assumed by the National Government, and that in this respect it is not interfered with by the fourteenth amendment."

Cooley's Constitutional Limitations, 706, says:

"In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the National Government, through any of its departments or officers, assume any supervision of the police regulations of the States."

Again, in 704, the same writer says:

"The police of a State in a comprehensive sense, embraces its whole system of internal regulations by which the State seeks not only to preserve the public order, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."

Pomeroy on Constitutional Law (p. 154) says:

"Those affairs which are local, which affect the individual citizen in his private capacity, abstracted from his relations to the whole political society, are managed by the separate State governments which were found in existence and left remaining in existence by the same Constitution."

It follows from these authorities that to apply the act of 1867 to the acts of individuals in a State where no law or usage exists to justify them, as an affirmative answer to the second question requires, would be to confer upon Congress a power not only prohibited to Congress, but specifically reserved to the States, and if that be the true construction of the act the same is unconstitutional.

The Thirteenth Amendment to the Constitution.

This amendment reads as follows:

"SECTION I. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SECTION II. Congress shall have power to enforce this article by appropriate legislation."

It is contended that this amendment authorizes the act of 1867, and that Congress thereunder has the power to punish a citizen in a State for the offense of slavery or involuntary servitude. Our real concern, however, is not so much whether Congress has such power as it is to know whether the act of 1867 was the exercise of such power. We have demonstrated that such act was not passed in pursuance of any such power, but in pursuance of the plenary power Congress has over the Territories. Our further contention is that before Congress could inflict punishment on a citizen of a State for the offense of slavery or involuntary servitude the penalty would have to be directed against those who

practiced slavery or involuntary servitude by virtue of some law or license of their State, for in no other way could the slavery or involuntary servitude referred to in the amendment exist. The act of 1867 not being directed in this way, the same is not "appropriate" legislation under said amendment.

In 163 U. S., 542, slavery is defined as follows:

"Slavery implies involuntary servitude, a state of bondage, the ownership of mankind as a chattel, or at least the control of the labor and service of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and service."

In 16th Georgia Reports, p. 505, we have this definition:

"Slavery is the dominion of the master over the slave—the entire subjection of one person to the will of another."

In 109 U. S., p. 20, the Civil Rights cases, it is also held:

"It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law, and therefore the thirteenth amendment may be regarded as nullifying all State laws which establish or uphold slavery."

25 American and English Encyclopedia of Law, p. 1089, says:

"Whatever theory may be held as to the origin of slavery generally in the United States, it is recognized that slavery was a municipal regulation and *could not exist without authority of law.* It was not necessary, however, that such law should be statutory, and while the institution was recognized by statutory law, no statute could be found enacting that slavery should exist. Usage of great antiquity acquired the force of law and was the basis upon which the legality of the institution rested."

In 2d McLean's (Ohio) Reports, p. 601, the court says:

"Slavery is local in its character. It depends upon the municipal law of the State where it is established."

The head-note is:

"Slavery exists only by virtue of the laws of the States, where it is sanctioned."

In 5th McLean (Ohio) Reports, p. 469, the head-note is:

"Slavery is a municipal regulation; is local, and cannot exist without authority of law."

On page 472 the court says:

"In Graves *vs.* Slaughter, a Mississippi case, reported in 15 Peters, p. 450, the Supreme Court of the United States declared that slavery was local and that it could not exist without authority of law. That it was a municipal regulation."

In 96 American Decisions, p. 613 (a Maryland case), it is held:

"Slavery as it existed in Maryland was not the creature of statutory law, but was established by the municipal law of the State."

In 20th New York Reports, p. 563, it is said:

"Every State except as it may have limited its power by express compact has the exclusive right to determine and regulate the status, or social and civil condition of all persons who may at any time be within its jurisdiction."

This is true today, except that a State is prohibited by the thirteenth amendment from establishing slavery. Justice Harlan, in his dissenting opinion, 165 U. S., p. 292, says:

"Slavery exists wherever the law recognizes a right of property in a human being."

In the light of these authorities establishing the fact that without a law authorizing it there can be no slavery, it cannot be lawful or constitutional for Congress to provide a punishment for an individual charged with slavery, there

being no law of his State authorizing slavery and, consequently, no slavery in its legal sense existing in his State.

It is said, however, that it is against "peonage" that the act of 1867 is directed, and not against legalized slavery. We submit that there is no distinction between slavery and peonage possible to be made under the thirteenth amendment. If peonage comes within the operation of the thirteenth amendment, it is because and only because it is slavery. We must remember, too, that the only justification for enforcing the act of 1867, in any State, is the claim that the act is authorized by the thirteenth amendment. Therefore, to claim one rule for slavery and another rule for peonage is to beg the whole question. But let us see about "peonage."

In the Slaughter-house case (16 Wallace, 72) the court says:

"Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery now or hereafter. If Mexican peonage, or the Chinese cooly labor system shall develop slavery of the Mexican or Chinese race within our Territory, this amendment may safely be trusted to make it void."

The head-note says:

"While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese cooly trade, where they amount to slavery or involuntary servitude."

Here we have the declaration from the very highest source that the only peonage affected by the thirteenth amendment is that which develops or amounts to slavery or involuntary servitude. Consequently the same rule applies to peonage that applies to slavery; and the rule as to slavery being, if there is no law to authorize it, there is no slavery, it necessarily follows, if there is no law to authorize *peonage*, there is no "peonage."

It is claimed, however, that the thirteenth amendment is broad and comprehensive and that it acts upon individuals as well as States, and therefore that the act of 1867 was a legitimate exercise of the power conferred by this amendment, and that an individual can be punished by act of Congress in a State for depriving another person in the same State of his liberty, even though there be no State law or usage authorizing or sanctioning such deprivation. Let us see the exact language used by this honorable court in this regard. In the Civil Rights case, reported in the 109 U. S., the court, in referring to the thirteenth amendment, on page 20, says:

"By its own unaided force and effect it abolished slavery and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit, and such legislation may be primary and direct in its character, for the amendment is not a mere prohibition of the State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."

Again, on page 23, the court says:

"Under the thirteenth amendment, the legislation, so far as is necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."

Again, on page 20, the court says:

"But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States, and it is assumed that the power vested in Congress to enforce the article by appropriate legislation clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."

Whatever the contention may be as to the meaning of this language, there are two facts already established that make its exact meaning of no importance to our contentions. The one is that this same decision (p. 20) holds that without a law authorizing it there can be no slavery, and the other is that the record before the court discloses no law or shadow of usage in Georgia or Florida authorizing slavery, involuntary servitude, or peonage.

No matter how broad the language quoted, it cannot and does not add to the meaning and words of the act of 1867. We have already shown what the act is and what it means. We wish now to show that the very decision quoted from sustains our construction of the act, and sustains, further, our proposition that the only individual in the State who can be acted on penally by the thirteenth amendment (and we care not how the amendment may otherwise affect him) is the individual who practices slavery or involuntary servitude as a part of a "system," and as an official, or under and by virtue of a law or usage recognized and maintained by the State.

The first witness we will call is Mr. Solicitor General Phillips, who filed the brief for the Government in the case under consideration, and who speaks as to the system. On page 7 of the report his brief reads:

"Granting that by involuntary servitude, as prohibited in the thirteenth amendment, is intended some institution—viz., custom, etc.,—of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is 'appropriate legislation' against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations, to create an institution."

It is well to note that the court disagreed with the conclusion drawn from his premise.

The next witness we will call is Mr. Justice Harlan, who disagreed in part from the conclusions of the majority of the court. In his dissenting opinion (p. 36), he said as to the individual:

"Congress, therefore, under its express power to enforce that amendment (thirteenth) by appropriate legislation, may enact laws to protect that people (African) against the deprivation, because of their race, of any civil rights granted to other freemen in the same State, and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and also upon at least such individuals and corporations as exercise public functions and wield power and authority under the State."

We then call attention to the opinion of the majority of the court, holding that the first and second sections of the act of Congress under consideration were void. These sections provided a punishment for individuals who denied equal accommodations to all citizens at inns, theaters, on public conveyances, etc. The contention was made that denying the same accommodation to negroes as was given to whites was to affix or maintain a badge or incident of slavery upon the negro, and was therefore a violation of the thirteenth amendment. The contention was, of course, also made that it was in violation of the fourteenth amendment. The majority of the court in their opinion adverted to the act of 1866, re-enacted in 1870. This was the act intended to give full force and effect to the thirteenth amendment, and it may be well to quote it here. Said act reads:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory of the United States to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase,

lease, hold and convey real and personal property and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

"SEC. 2. That any person who under color of any law, statute, ordinance, regulation, or custom shall subject, or cause to be subjected any inhabitant of any State or Territory to the deprivation of any right secured and protected by this act, etc., shall be punished, etc."

The court in the opinion we are quoting from says, on page 16, in speaking of this act of 1866:

"But the penal part by which the declaration (in the first section) is enforced and which is really the effective part of the law retains the reference to State laws by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory."

Further, in the same opinion, page 15, the court holds that the fourth section of the act it is then considering, which section provides a punishment against any person charged with summoning jurors in a State who shall exclude or fail to summon a citizen on account of race, color, or previous condition, is constitutional, but says:

"But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law and the first part of the section is aimed at certain disqualifying laws * * * and the second clause is directed against those who in assuming to use the authority of the State government carry into effect such a rule of disqualification."

Note this language: "Disqualifications for service on juries are only created by the law," and therefore the man who acts under the authority of the State government can be punished. Note that the man who acts under color of

"law, statute, ordinance" of State or Territory is punished under the act of 1866, and then note that the man who acts as an individual in denying equal accommodation at inns, theaters, etc., cannot be punished. Then apply this to slavery. It, too, is "created only by the law." It follows, therefore, that only the person who practices slavery under the authority of his State government can be punished by Federal statute. He cannot practice it in any other way. If, as an individual, he deprives another individual of his liberty, he commits a private wrong, for which he is amenable only to his State.

If anything more were needed to demonstrate the correctness of this contention, it is found in the civil rights act of 1866, just quoted. The significance of this act lies in the language of the second section, which expresses the congressional interpretation of the thirteenth amendment to the effect that the power to punish under this amendment is limited to those individuals who act under color of law, statute, ordinance, etc., of any State or Territory. We are thus sustained in our contention by both congressional and Supreme Court interpretation.

If it be suggested, however, that Congress did not recognize any such interpretation in the act of 1867 and did not limit same to individuals acting under color of law, the answer is that in that act Congress was legislating for the Territory of New Mexico, and the limitation was not necessary, for the power of Congress there was plenary.

The mere fact that Congress did not place the same limitation in the act of 1867 that it placed in the act of 1866 is in itself a powerful, if not convincing, argument that Congress in 1867 was not attempting to reach persons in the States. To give the act of 1867 the construction we insist upon is to maintain for New Mexico the only part of the United States in which "peonage" existed, a just and wholesome law, but to give it the construction that an affirmative answer to the questions certified by the honorable circuit

court of appeals would require is to do violence to the legislative intent, to the ordinary meaning of words, to all rules of construction, to the Constitution itself, and is to defeat and annul an otherwise beneficent law.

That the thirteenth amendment in its prohibitory feature is aimed solely at the States is made clear, it seems to us, by its own language. The words "except as a punishment for crime whereof the party shall have been duly convicted" could necessarily apply only to the States, and the full meaning and scope of the amendment is by this language made plain. In further support of this contention we cite 16 Wallace, p. 69, as follows:

"*The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant.* The word 'servitude' is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery."

In 12 Federal Reporter, page 577, we find this: "Where a State has been guilty of no violation of the provisions of the thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States, no power is conferred on Congress to punish private individuals who, acting without any authority from the State, and it may be in defiance of law, invades the rights of the citizen, which are protected by such amendments. So when an act of Congress is directed exclusively against the action of individuals, and not of the State, the law is broader than the amendments by which it is attempted to be justified and is without constitutional warrant."

The notes on page 583 of this opinion read: "Article 13 of the amendments of the Constitution of the United States was not intended to afford relief to parties unlawfully deprived of their liberty: its purpose is satisfied when such restraint is rendered illegal" (40 Cal., p. 198; 1 Fed. Rep., p. 481).

The object of the amendment was to deprive both Congress and the respective States of the power to reduce any person to the condition of slavery or involuntary servitude except as a punishment for crime (28 Cal., p. 458), the term servitude having a larger significance than slavery (16 Wallace, p. 69; 1 Abbott's U. S., 84 * * *).

This amendment does not authorize Congress to pass laws for the punishment of offenses against persons of the colored race; that belongs to the State governments (1 Woods, p. 308).

In 40 Cal., 198, decided in 1870, the head-note is:

"The first section of the thirteenth amendment, which is a mere limitation upon the powers of the States, was directed to the States in their sovereign capacity, as lawmakers, and was not intended to afford relief to individuals unlawfully deprived of their liberty. Its purpose is satisfied when such restraint is rendered illegal. The second section of the thirteenth amendment authorizes Congress to pass only such laws as would be appropriate to enforce a limitation on the legislative power of the State. It confers upon Congress no power to establish a police system for the internal government of the State, or to control their operation in any way whatever."

Congress has never passed a law providing a punishment for slavery or for involuntary servitude in those terms, and the authorities cited show why Congress has not done so. No State having sought to enact or establish slavery since the ratification of the thirteenth amendment, there has been no occasion for Congress to act in the matter. If it did act, it is unquestionable, from the authorities cited, that its action would be directed against individuals acting as State officers or in some public capacity in the State or under and by virtue of some State law. The act of 1867 is not so directed, and is, therefore, not "appropriate" legislation under the amendment, and a negative answer must be given to each of the questions certified by the honorable circuit court of appeals.

But recurring to the language of the decision in the Civil Rights case, 109 U. S., p. 20, in which such a seemingly broad and comprehensive meaning is given to the thirteenth amendment, let us examine some other amendments to the Constitution and see if the real meaning of this language cannot be definitely ascertained. The fifth amendment, among other things, says:

"Nor shall any person * * * be deprived of life, liberty, or property without due process of law."

The fourteenth amendment, among other things, says:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

Clearly this part of the fourteenth amendment is an inhibition against the States, but equally clear is it that the part of the fifth amendment quoted is not. Now, if Congress under the thirteenth amendment, the same merely saying that involuntary servitude, except as a punishment for crime, shall not exist within the United States, can punish a citizen of a State for holding another citizen of the same State in involuntary servitude, when in doing so he acts as an individual and without authority of law, why cannot Congress punish the citizen of a State who wantonly takes the life of another citizen of the same State?

The victim of the murderer is deprived of his life, "without due process of law," and the murderer has violated the Constitution just as much as has the person who holds another in involuntary servitude, and, in addition, has committed a much more serious crime. To hold another in involuntary servitude is to deprive him of his liberty. Then why not punish the individual who does this, by act of Congress under the fifth amendment, as well as under the thirteenth amendment?

You may well say you cannot punish him under the fourteenth amendment, because that amendment is directed

specifically against the States, but the fifth amendment is not so directed. Why not punish him under that? The reason you cannot do so is stated in 123 U. S., 166, as follows:

"That the first ten articles of amendment were not intended to limit the powers of the State governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since."

To the same effect is 153 U. S., p. 538; 164 U. S., p. 158; 175 U. S., p. 174.

In other words, the fifth amendment, being one of the first ten, is merely a limitation on the United States Government itself. It is a part of the bill of rights necessary to the liberty of a free people. It is the declaration of the people that their Government shall not deprive them of life, liberty, or property, except by due process of law. I have called attention, however, to the language of the fifth amendment to show how easy it is to enter upon fallacious reasoning as to the thirteenth amendment.

Now, let us consider the fifth, the thirteenth, and the fourteenth amendments together. It is certainly competent to consider the thirteenth and the fourteenth together, and indeed the fifteenth, for the Supreme Court has said that the thirteenth, fourteenth, and fifteenth amendments are each part of one general scheme to give freedom and liberty to the negro race and to place this race on an equality with the white race in all civil rights.

Now, the fifth, the thirteenth, and the fourteenth amendments each deal with human liberty. The fifth is an inhibition against the power of the United States Government to deprive a person of liberty, except by "due process of law." The fourteenth is an inhibition against the power of State governments to deprive a person of liberty, except by "due process of law." The thirteenth is but an enlargement

of the inhibition contained in the fifth and fourteenth amendments. It applies to both the State and the National Governments, and says that neither of them, even with "due process of law," shall deprive a person of liberty, if such deprivation amounts to slavery or involuntary servitude, except as a punishment for crime.

That the thirteenth amendment in its prohibitory phase is not directed against individuals, but is directed against government, State and National, must be true, because we have already seen that slavery cannot exist except through law, and law necessarily means government. That the thirteenth amendment in its declaratory phase does apply to individuals we have seen in the opinion of the Supreme Court in the Civil Rights cases. The court says:

"The amendment is not a mere prohibition of the State laws establishing or upholding slavery, but an absolute declaration that slavery, or involuntary servitude shall not exist in any part of the United States."

Also:

"The legislation, so far as is necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."

In other words, the prohibitory feature is against laws, State or national, that uphold slavery. The declaratory feature ignores State lines, breaks down the barriers of police power, enters the States and declares freedom and liberty to exist there, and that any "proper" legislation operating upon the individual and "necessary" to give him freedom Congress may enact, "whether sanctioned by State legislation or not."

The declaratory feature says that notwithstanding a State has the power to regulate the intercourse of its citizens, the one with the other, and to prescribe a rule of conduct for

them, whether or not a State declares its citizens to be freemen, they are freemen, "without the legislative sanction of the State" as well as with it.

When we deal, however, with the prohibitory feature of the amendment, we find, as already stated, that of reason and necessity this is directed against the States, and any punishment that Congress may enact in pursuance of the amendment must be under the phase of it which prohibits and can, in reason, law, and logic, be directed against only those who invoke, or claim, or in some way seek to justify their conduct by the laws, rules, regulations, or usage of their State government. It would be the veriest waste of time for Congress to pass a law that no State shall establish slavery or involuntary servitude. The thirteenth amendment has already said that, and under that "self-executing" amendment no State can legally and constitutionally establish slavery.

Congress cannot say that whoever practices slavery shall be punished, for that would be to state no offense, because nobody can practice slavery without the help of his State. The thirteenth amendment makes such help by the State of no avail to him who evokes it, for it is this help that the thirteenth amendment prohibits; but it must be invoked for the amendment to apply.

What Congress can do and all that Congress can do is to say that whoever practices slavery "by the help of his State" shall be punished, but Congress has never so much as said that. The act of 1867, if it were otherwise applicable to Georgia and Florida, does not read that way, and, even if it read that way, a conviction could not be had in Georgia or Florida under it, because the offense, as thus defined, could not be proven.

The construction thus given the thirteenth amendment is further justified when we turn to the opinion of Chief Justice Chase, in 1st Abbott's, p. 84, *In re* Turner, where *habeas corpus* was granted and Turner discharged, because it was

decided that the contract of apprenticeship under which he was held was involuntary servitude, and that "the first clause of the thirteenth amendment to the Constitution of the United States interdicts slavery and involuntary servitude, except as a punishment for crime, and establishes freedom as the constitutional right of all persons in the United States."

Also justified in 31 Federal Rep., p. 327. The head-note here is:

"A custom or right prevailing among the uncivilized tribes of Indians in Alaska, whereby slaves are bought and sold and held in servitude against their free will and subject to ill treatment at the pleasure of the owner is contrary to the thirteenth amendment to the Constitution of the United States, and the 'Civil Rights bill' of 1866, and a person so held in slavery will be relieved by order of the court upon writ of *habeas corpus*."

We have in these two cases illustrations of the declaratory power and effect of the thirteenth amendment. We realize here what was meant by this honorable court when it said that this amendment was "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States," and that the same was "self-executing." The amendment establishing freedom, the person deprived of it could have it restored to him by *habeas corpus*. This is quite a different proposition from one proposing to punish the person causing the deprivation. In the one case, the amendment decreeing universal freedom, the United States courts could execute the decree by conferring freedom upon the one denied it, whether the denial was "sanctioned by State legislation or not," and even though the execution of the decree operated only on "the act of an individual," the act being the one that caused the denial of freedom. In the other case, if the person depriving another of his liberty violated the laws of his State in so doing, the State only could punish him, for this power to protect its citizens was

never surrendered by the State to the General Government. If the act of depriving another of his liberty, however, was in pursuance of a State law, or a usage sanctioned by the State, and was not for the punishment of a crime whereof the party had been duly convicted, then under a properly constructed law the United States courts could inflict the punishment. The act of 1867 not being such a properly constructed law and being limited solely to "peonage," which involves something radically different from the mere personal and illegal deprivation of liberty, the punishment could not be inflicted under that law.

The Fourteenth Amendment.

We cite various authorities on this amendment because the opinions cited deal with the whole range of Federal and State power, defining clearly the line of distinction between them, and because the fourteenth amendment, following the thirteenth, the several decisions quoted give no intimation or suggestion that the power of Congress over the citizens of the States or over the police power of the States was broadened by the thirteenth amendment. Upon the contrary, the statement is sometimes broadly made to the reverse of that, as in 123 U. S., p. 31, the court in speaking of the fourteenth amendment says:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power' to prescribe regulations to promote the health, peace, morals, education and good order of the people, etc."

The authorities cited go directly to the point that the thirteenth amendment in its prohibitory feature was aimed solely at the States.

109 U. S., 17:

"In this connection it is proper to state that simple rights, such as are guaranteed by the Constitution against State

aggression cannot be impaired by the wrongful act of individuals, unsupported by State authority in the shape of laws, customs, or judicial, or executive proceeding. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual."

The court was speaking of the fourteenth amendment, and speaking of this also, the court says (p. 11):

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."

Further (p. 11):

"It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of State laws and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."

Also:

"It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation."

Also (p. 13):

"Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of State legislatures and to succeed them. It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the State, without due process of law, Congress may, therefore, provide due process of law for their vindication in every case."

Further, the court said (p. 14), in speaking of the act of Congress requiring the furnishing of equal accommodations at inns, theaters, etc.:

"It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens and whose authorities are ever ready to enforce such laws as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence and lays down rules for the conduct of individuals in society toward each other and imposes sanction for the enforcement of those rules without referring in any manner to any supposed action of the State or its authorities."

"If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property?"

In 16 Wallace, 78:

"The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character * * * the argument has a force that is irresistible, etc."

Harris case (106 U. S., p. 629). This case involved the constitutionality of section 5519 of the Revised Statutes, which section provided a punishment:

"If two or more persons in any State or Territory conspire or go in disguise upon the highway or upon the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or for the purpose of preventing or hinder-

ing the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, etc."

This statute, in this opinion, is held unconstitutional, and the entire opinion is valuable and to the point. It is held that neither the thirteenth, fourteenth, or fifteenth amendment to the Constitution, or section 2 of article IV of the Constitution, authorized this statute, and that no other provision of the Constitution authorized it.

As to the fourteenth amendment, the court says (p. 638):

"It is perfectly clear from the language of the first section that its purpose was to place a restraint upon the action of the States."

And again, on page 639, the court says:

"Where the State has been guilty of no violations of its provisions, where it has not made or enforced any law abridging the privileges or immunities of citizens of the United States, nor none of its departments has deprived any person of life, liberty, or property, without due process of law, or denied to any person within its jurisdiction, the equal protection of the law; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

United States *vs.* Cruikshank *et al.* (92 U. S., p. 542), the first head-note:

"The duty of a government to afford protection is limited always by the power it possesses for that purpose."

The third head-note:

"The Government of the United States, although it is within the scope of its powers supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly, or by implication, placed

under its jurisdiction. All that cannot be so granted or secured are left under the exclusive protection of the States."

The eighth head-note:

"The duty of protecting all of its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right."

100 U. S., 339:

"Whoever by virtue of his public position under a State government deprives another of life, liberty, or property without due process of law or denies or takes away the equal protection of the laws, violates that inhibition" (fourteenth amendment).

136 U. S., 436; 137 U. S., 624; 127 U. S., 678:

"The fourteenth amendment to the Federal Constitution was not designed to interfere with the power of the State to protect the lives, liberties, and property of its citizens and to promote their health, peace, morals, education, and good order."

139 U. S., 463:

"By the fourteenth amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons or classes of persons of equal and impartial justice under the law, etc."

16 Federal Reporter, 301:

"This section (14th amendment) gives a citizen of the United States or of a State and even persons who are not citizens an additional guaranty of the enjoyment of their fundamental rights. This guaranty is not against individual action or encroachment, but against the State and its laws and officers. These rights of the citizen are still to be protected and enforced as between man and man by and through State laws and agencies, and not by the United States and its laws" (100 U. S., 313; 106 U. S., 629; S. C., 1 Sup. Ct. Rep., 601, and 12 Fed. Rep., 577, cited in support).

4 Woods' Reports, 351, in referring to the fourteenth amendment, says: "If it had been intended to confer upon Congress the power to legislate with reference to the infraction of the rights of one citizen of the State against another citizen of the same State, it would have said so. I do not think the power was conferred by this section to declare that the Federal court should have exclusive and concurrent jurisdiction with the State courts to protect the rights of national and State citizenship."

We learn throughout these opinions that the protection of the lives, liberties, and property of citizens rests upon the States; that this duty was originally assumed by the States and remains there, and consequently was not assumed by and does not vest in the United States Government, and that so long as the States do not violate the inhibitions against them fixed by the Constitution these inhibitions impose no duty and confer no power upon Congress.

If the act of 1867 means what an affirmative answer to the questions propounded by the honorable circuit court will compel it to mean, and if it be true that "mere scattered trespasses against liberty by private persons" may be punished in the Federal courts under an act of Congress that is valid, then we may well ask, in the language of this honorable court: "Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of liberty and property?" And we may also ask: "Why not make Congress take the place of the State legislatures and succeed them?"

The Fifteenth Amendment.

This amendment provides in section 1 that—

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

And in section 2 that—

"The Congress shall have power to enforce this article by appropriate legislation."

In 190 U. S., 136, it is held that this amendment "relates solely to action by the United States or by any State, and does not contemplate wrongful individual acts." It is also held that section 5507, Revised Statutes, is not appropriate legislation under this amendment, it being an act to punish individuals who hinder, control, or intimidate others at any election, State or Federal, from exercising the right of suffrage guaranteed by this amendment.

We thus see that the fourteenth and fifteenth amendments are both limited to State action, and these amendments, together with the thirteenth, being one general scheme to confer civil rights upon the negro, it would seem that, reasoning by analogy alone, the prohibition feature or part of the thirteenth amendment is likewise limited to State action.

Another Constitutional View of the Act of 1867.

It will be noticed that this act provides, among other things: "And all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United States, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly, or indirectly, the *voluntary* or involuntary service or labor of any persons, as peons, in liquidation of any debt or obligation, or otherwise, be and the same are hereby declared null and void." Granting that this enactment would be a valid exercise of the plenary power of Congress over a Territory and would be a valid territorial law, is it by reason of the use of the words "voluntary" and "peons" appropriate or valid legislation for State or Territory under the thirteenth amendment? This

amendment applies only to involuntary servitude; the law in question to both voluntary and involuntary servitude, and is much broader than the power conferred by the amendment.

If we consider the act as an attempt by Congress to legislate under the thirteenth amendment, then it must be conceded that Congress exceeded its power. This being conceded, does this excess of power exercised by Congress invalidate the entire enactment? We think it does. In the Harris case, 106 U. S., 629, the opinion holds that section 5519, R. S., was not authorized by the thirteenth amendment. The conclusion appears to be based largely upon the fact that the provisions of this section were broader than either the letter or spirit of the thirteenth amendment would justify. The court says: "Even if the amendment (13th) is held to be directed against the actions of private individuals as well as against the actions of the State, the law under consideration covers cases both within and without the provisions of the amendment, and, therefore, cannot be sustained." If this reasoning be sound, then it must follow that the act of 1867 covering cases both within and without the same amendment cannot be sustained.

To the same effect is 12 Fed. Rep., p. 377, hereinbefore cited, where it is held, in speaking particularly of the thirteenth, fourteenth, and fifteenth amendments: "So where an act of Congress is directed exclusively against the action of individuals, and not of the State, the law is broader than the amendments by which it is attempted to be justified and is without constitutional warrant." The thirteenth amendment, whether directed against individuals or not, is undeniably directed against the States, while section 5526, R. S., is directed solely against individuals, and according to the authority quoted is without constitutional warrant.

Another case in point is 190 U. S., p. 127, already referred to. It was there held that "although section 5507, R. S., which provides for the punishment of individuals who

hinder, control, or intimidate others from exercising the right of suffrage guaranteed by the fifteenth amendment, purports on its face to be an exercise of the power granted to Congress by the fifteenth amendment, it cannot be sustained as an appropriate exercise of that power. That amendment relates solely to action by the United States or by any State, and does not contemplate individual acts. While Congress has ample power in respect to elections of Representatives to Congress, section 5507 cannot be sustained under such general power, because Congress did not act in the exercise of such power."

The defendants in this case were charged as individuals with preventing and intimidating by bribery certain named parties from voting at an election for a member of Congress. The indictment was framed under section 5507, R. S., which section was directed against individuals hindering, preventing, or controlling another from "exercising the right of suffrage guaranteed by the fifteenth amendment." The section made no discrimination between Federal and State elections. The court held that, so far as the fifteenth amendment was concerned, section 5507 was not a valid exercise of power under it, the amendment being directed against States and not individuals. This being true, section 5507, covering acts of individuals in both Federal and State elections, could not be sustained; and this was true, notwithstanding the fact that Congress had ample power outside of and independently of the fifteenth amendment to punish bribery at a congressional election.

By analogy, when we deal with section 5526, R. S., or the act of 1867, we find that if same was enacted under the plenary power of Congress over the Territories it is a valid territorial law, but is not applicable in any way to the States. But if it be insisted that said law was enacted in pursuance of the power conferred on Congress by the thirteenth amendment, the same was not a valid exercise of the power there conferred, because it exceeds the power con-

ferred, and it cannot be sustained for either State or Territory; and this, notwithstanding the fact that Congress had the power outside of the thirteenth amendment to enact the law for the benefit of New Mexico and other Territories.

The rules of construction cited all point inevitably to the conclusion that the act of 1867, if it is to be maintained, must be held to be a territorial law, enacted under the plenary power of Congress over the Territories and having no applicability to the States. It is significant, in this connection, that so far as the records of this court show, and so far as the records of any other court are available, it has been held and considered as a territorial law for more than thirty years. In all the multitude of the decisions of this honorable court on the thirteenth, fourteenth, and fifteenth amendments there is not to be found the first suggestion that this act was passed in the exercise of the power conferred by the thirteenth amendment.

The reference to "peonage" in the Slaughter-house cases in 16 Wallace, rendered long after the act of 1867, is a clear intimation that the thirteenth amendment up to that time had never been invoked to suppress or abolish peonage. The strong language used by Justice Bradley in the Civil Rights cases in 109 U. S., to which reference has been had, was used sixteen years after the act of 1867 and may be fairly construed as an assertion that up to that time Congress had never undertaken to legislate against individuals under the power asserted to be given by the thirteenth amendment. There is certainly no intimation that the power has ever been exercised. The language of the learned justice is, "may be direct and primary;" not "has been."

There is another authority that may be invoked on the rule of construction. In 12 Peters, p. 72, it is held:

"If a section of an act of Congress admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it

is the duty of the Supreme Court to adopt the former construction, because a presumption never ought to be indulged that Congress meant to exercise, or usurp unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."

If the rule here laid down be sound, then the courts should hold the act of 1867 to be a territorial law, having no reference to the States, for to construe it as a State law enacted under the power of the thirteenth amendment would be to press it beyond the constitutional power of Congress.

There is still another rule laid down with reference to the duty of States to enforce amendments to the Constitution of the United States which sustains our contention that the power, duty, and responsibility to protect the citizens of a State and to enforce their rights under any amendment to the United States Constitution rest with the State, and not with the United States Government. In 103 U. S., 370, it is said:

"A State must recognize as binding an amendment to the Constitution of the United States and enforce it within its own limits, without reference to any inconsistent provisions in its own constitution or statutes."

The court further said (p. 389):

"The presumption should be indulged in the first instance that the State recognizes as its plain duty an amendment of the Federal Constitution from the time of its adoption as binding on all its citizens and every department of its government, and to be enforced within its limits without reference to any inconsistent provisions in its own constitution or statutes."

The Georgia Law on Slavery.

The authority just quoted leads us to cite some Georgia law on the subject of slavery and involuntary servitude. We are further justified in so doing in view of the fact that in the case at bar Clyatt was clearly shown to have brought the parties named in the indictment from Florida to Georgia, so whatever their condition after their arrest or to whatever they were returned that condition and that thing to which they were returned was in Georgia. The authorities cited show that they could not have been held to any legalized condition of peonage or slavery or involuntary servitude in the State of Georgia, and that Clyatt, therefore, was improperly convicted and should be given his liberty.

34 Georgia Reports, 483, shows that Georgia promptly recognized the thirteenth amendment as binding on her. The opinion says: "The convention which met in November, 1865, recognized the abolition of slavery and swept away at a blow all laws in reference to negroes as slaves, at which time their freedom began."

The Georgia constitution prescribes (Code, sec. 5714):

"SLAVERY.—There shall be within the State of Georgia neither slavery nor involuntary servitude, save as a punishment for crime after legal conviction thereof."

The constitution further says (Code, sec. 5718):

"There shall be no imprisonment for debt."

Further (Code, sec. 5763):

"Legislative acts in violation of the constitution or of the Constitution of the United States are void, and the judiciary shall so declare them."

In 72 Georgia, 69, 3d head-note, the court held:

"If the plaintiff hired a person of full age to the defendant and received from him the note in suit for the services

of the person so hired, this was an illegal transaction, and the note so given was void as being contrary to public policy and in violation of the thirteenth amendment of the Constitution of the United States and of paragraph 17 of the bill of rights in the constitution of Georgia."

In 74 Georgia, 247, the court held:

"Besides, we are not aware of any power possessed by a court of equity, or any other court to compel a party to perform personal service for another which he had contracted to perform, but was unwilling to render. This would reduce him to involuntary servitude, not as punishment for crime, but for an alleged breach of contract, and would be directly in the teeth of the Constitution."

In 95 Georgia, 538, the court holds:

"The county authorities have no power to hire out convicts sentenced under the provisions of section 4310 to a private individual, whether being so hired, they be worked in chain gangs or otherwise, and so much of the acts of the legislature embodied in sections 4814, 4815, 4820, 4821 (*e*) of the Code as authorizes such a hiring is repealed by the act of August 11, 1879" (Code, 4310).

In 45 Georgia, 128:

"Where A advances $20 to a laborer on the promise of the latter to work it out, and the laborer afterwards refuses to do so, he is not guilty of the offense of being a common cheat and swindler."

In part 3 of the Code of Georgia, the same being the penal code, we find the following section, 109:

"Every person who forcibly abducts or steals away any person without lawful authority or warrant from this State or any county thereof, and sends or conveys such person beyond the limits of the State, or a county thereof, against his will, is guilty of kidnaping."

The punishment (sec. 111) is not less than four years' nor more than seven years' confinement in the penitentiary.

"SEC. 106. False imprisonment is a violation of the personal liberty of a person and consists in confinement or detention of a person without sufficient legal authority."

And a penalty is provided therefor:

"SEC. 123. If any person, or persons, by threats, violence, or intimidation, or other unlawful means shall prevent or attempt to prevent any person or persons in this State from engaging in, remaining in, or performing the business, labor or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor."

"SEC. 124. If any person, or persons, singly or together, or in combination, shall conspire to prevent, or attempt to prevent any person or persons by threats, violence or intimidation, from engaging in, remaining, or performing the business, labor or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor."

"SEC. 125. If any person or persons, singly or by conspiring together, shall hinder any person or persons who desire to labor, from so doing, or hinder any person by threats, violence, or intimidation, from being employed as a laborer or employee, such offender shall be guilty of a misdemeanor."

Sections 128, 129, 130, 131, 132, 133, and 134 cover the law against employers blacklisting employees.

In Conclusion.

The only authority that we have found squarely deciding the act of 1867 to have no application to Georgia, there being no peonage in Georgia, is the opinion of Judge Newman, of the United States district court for the northern district of Georgia. The case is reported in Federal Reporter, vol. 127, No. 1. The learned judge in his opinion says truly:

"It would be the merest perversion of this act to attempt to apply it to an ordinary case of restraint of personal

liberty, and the case is not strengthened by the charge that the person so restrained is of African descent. However wrongful and illegal some of the acts charged in the indictment may be, they cannot be punished under the statute named. The purpose of this act, as stated, was to abolish this system of peonage and to render null and void all acts, laws, resolutions, orders, regulations, or usages in New Mexico or elsewhere which established or sought to establish this system. The penal part of the act will not be enlarged beyond the scope and purpose of the act as above indicated. The penalty is for holding under, or for arresting or returning to this condition of peonage. A person must have been held under this system or arrested and returned to it; that is to a preëxisting condition of peonage."

We submit that on the reasoning and authorities offered this honorable court should answer each of the three questions certified by the honorable circuit court of appeals of the United States, fifth circuit, in the negative, and we submit, further, that, even though this should not be done, the plaintiff in error, Clyatt, on the facts appearing in the transcript of the record, which is before this honorable court, should by appropriate and proper order be given his freedom or be awarded a new hearing.

Respectfully submitted.

W. G. Brantley,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 235.

SAMUEL M. CLYATT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

INDICTMENT IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, UNDER SECTIONS 1990 AND 5526 OF THE REVISED STATUTES OF THE UNITED STATES; WRIT OF ERROR FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, CERTIFIED TO THE UNITED STATES SUPREME COURT FOR INSTRUCTIONS.

Brief of A. O. Bacon, of Counsel, and W. M. Hammond, Attorney for Plaintiff in Error.

Samuel M. Clyatt, a citizen of the county of Berrien, in the State of Georgia, was at an adjourned term of the circuit court of the United States for the northern district of Florida, held on the 19th day of November, anno Domini one thousand nine hundred and one (1901), arraigned and tried upon an indictment charging him with the violation of sections

1990 and 5526 of the Revised Statutes of the United States, known as the anti-peonage statutes, the indictment being as follows:

NORTHERN DISTRICT OF FLORIDA, ss:

The grand jurors of the United States of America, empaneled and sworn within and for the district aforesaid, on their oaths present, that one, Samuel M. Clyatt, heretofore, to wit: on the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did, then and there, unlawfully and knowingly return one, Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and Mose Ridley, to work to and for Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt and Tift, to be held by them the said Clyatt and Tift to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

2d. And the grand jurors aforesaid, on their oaths aforesaid, do further present that one, Samuel M. Clyatt, heretofore, to wit: on the eleventh day of February, in the year of our Lord one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did, then and there, unlawfully and knowingly cause and aid to be returned Will Gordon and Mose Ridley to a condition of peonage, by forcibly and against the will of them the said Will Gordon and Mose Ridley, causing and aiding them the said Will Gordon and Mose Ridley to be returned to work to and for

Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners, doing business under the firm name and style of Clyatt & Tift, to work out a debt claimed to be due to them the said Clyatt & Tift by them, the said Will Gordon and Mose Ridley, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

JOHN EAGAN,
United States Attorney.

To which indictment defendant, Samuel M. Clyatt, pleaded "not guilty," and the jury thereafter, to wit, on the twenty-fifth (25th) of March, anno Domini 1902, rendered a verdict of guilty; whereupon the defendant, on the 26th day of March, 1902, through his attorneys, Henderson & Henderson and C. W. Fulwood, filed his motion for a new trial based on twelve grounds which are fully set out on pages five and six of the transcript of the record, which motion was afterwards, to wit, on the 27th day of March, 1902, heard and overruled by his honor Charles Swayne, presiding judge, whereupon, and on the same day, the defendant, through his said attorneys, made and filed a motion in arrest of judgment on the grounds following, to wit:

1st. That the statutes under which this indictment is found, to wit, sections 1990 and 5526 of the Revised Statutes of the United States, do not apply to the charges made against this defendant in the indictment or to the evidence in support of the same.

2d. That there was no proof whatever of any peonage previous to or subsequent to the finding of the indictment, on Mose Ridley or Will Gordon inflicted or caused to be inflicted by this defendant, supporting the offense of peonage as charged in this indictment.

3d. That the offense of peonage as defined in the statute and the punishment thereof as defined and provided in the sections 1990 and 5526 of the Revised Statutes of the United States, if constitutional, which is denied, was never made applicable to the fact stated and proven in the indictment, and such offenses as were proven are cognizable only in the State courts; no Federal jurisdiction appears in this cause.

4th. No system of peonage is charged or proven to have been in evidence within this jurisdiction.

5th. The proof of an existing custom not charged in the indictment to exist in Levy county, Florida, or in any other locality, could not supply the absence of any proof as to the return of Gordon and Ridley to a condition of involuntary servitude.

Wherefore this defendant prays, for the reasons apparent in the record, that such judgment be arrested.

HENDERSON AND HENDERSON and
C. W. FULWOOD,
Attorneys for Samuel M. Clyatt, the Defendant.

MARCH 27TH, 1902.

Which motion in arrest was then and there heard and overruled by the said presiding judge, who thereupon sentenced the said Samuel M. Clyatt to confinement at hard labor for the full term of four years, who thereupon applied for and obtained a writ of error from the United States circuit court of appeals for the fifth circuit to the United States circuit court for the northern district of Florida, and upon the hearing of the same the United States circuit court of appeals for the fifth circuit certified to the Supreme Court three questions of law for instruction thereupon, said questions being as follows:

1. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States?

2. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States, when, at the time of the arrest and return of such person, there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage?

3. Do the acts and conduct of defendant as charged in the indictment constitute the offense of holding, arresting, or returning to a condition of peonage within the purview of section 5526 of the Revised Statutes?

The case therefore stands before this court for determination on exceptions filed to the judgment of the United States circuit court for the northern district of Florida, overruling defendant's motion for a new trial, and on his exceptions to the judgment of said court overruling his motion in arrest of judgment, in so far, at least, as the questions raised by the exceptions above mentioned are connected with and involved in the questions certified to this court from the circuit court of appeals for the fifth circuit.

The errors complained of and fully set out on pages 5 and 6 of the record are of three sorts, and for convenience may be grouped under three heads:

1st. The insufficiency of the evidence to support the verdict.

2d. The inapplicability of the statutes—sections 1990 and 5526—to the facts proved at the trial.

3d. Errors in admitting testimony.

As these questions, however, can be more conveniently and perhaps more intelligently considered after the errors of law complained of in the grounds of the motion in arrest of judgment and the questions certified to this court have been dealt with, it is deemed proper to postpone the discussion of them until the latter have been considered. We therefore proceed to the discussion of the matters of law set out in the exceptions and in the certificate for instruction.

As to the Sufficiency of the Indictment.

We insist that the indictment against Clyatt is legally insufficient and fatally defective in that it fails to properly charge him with any offense against the Government, and hence there could have been in no court jurisdiction to arraign and try the defendant upon it. The doctrine is fundamental that every wrongful fact, with each particular modification thereof, which the law requires to be taken into the account, must be alleged in the indictment.

See 1st Bishop's New Crim. Pro., secs. 77, 80, 81, 325, (2), (5), (6).

"An accusation of crime should not be in doubtful terms, or in outline indistinct; it must be certain."

1st Bish. New Crim. Pro., sec. 323.

To be adequate every indictment must be in distinct and full terms—so plain as to preclude the necessity of guessing

at the meaning; and every fact essential to make a *prima facie* of guilt must be stated.

1st Bish. New Crim. Pro., secs. 507, 518, and 519.

Examining the indictment in the light of these indispensable rules, it will be found to have been based on two sections of the Revised Statutes of the United States. The first of these, section 1990, contains a prohibition against the maintenance of the system known as "peonage" in the Territory of New Mexico or elsewhere in the United States, and follows this prohibition with a general and somewhat loose definition of peonage. The section, 5526, simply prescribes a penalty against the holding, arresting, returning, or causing to be held or returned, or in any manner aiding in the arrest or return of any person to a condition of peonage. A subsequent section, 5532, prescribes as an additional penalty disqualification for holding any office of profit or trust under the United States; and it is therefore manifest that to be rightly interpreted and applied the sections first mentioned must be considered together—that is, as a whole. In fact these two sections were included in a single law of Congress—the act of March 2, 1867.

See vol. 14 U. S. Statutes at Large, page 546.

And it is not easy to understand why these two sections of the act are made to appear in widely separated sections of the Revised Statutes, as though each had been a separate enactment. Whatever may have been the reason for this, however, it is absolutely certain that a system of peonage must exist somewhere, and such existence must be alleged in an indictment and established by proof before the penalties prescribed in section 5526 can be incurred. Now, it may be conceded that if the offense set out and condemned in these sections was one that existed at common law, and which had neither been changed nor enlarged by any statute, then it would be optional with the pleader to frame his

indictment as at common law or according to the statutory form, but in all cases where a statute defines an offense, or attempts to define it, all the ingredients which enter into the offense, whether set out in the statute in definite terms or whether interpreted into it, must be stated; nothing less will suffice to charge the defendant with all the acts that go to make up the statutory definition. Indeed it is a rule that has but few exceptions that all facts necessary to a full description of the crime be set out in an indictment, and an indictment failing in this respect is ill.

See Bish. New Crim. Pro., secs. 593, 597, 599, 611, and 612.

It is further insisted on as an indispensable rule of criminal pleading that where technical terms merely are used in a statute creating but not particularly defining an offense, so that some other meaning wider or narrower than the words of the statute must be interpreted into it, an indictment under such statute must not only cover and include the statutory terms, but the interpreted elements thereof also.

See 1st Bish. New Crim. Pro., secs. 628, 629.

And a motion in arrest of judgment for a defect of this sort is good.

See Bish. New Crim. Pro., sec. 1286.

In indictments based on statutes it is not sufficient to charge in the words of the statute where the statute does not use language sufficient and proper to describe the offense; nor is it sufficient where a statute simply designates the offense, but does not describe its constituent elements, to charge merely in the language of the statute, but every ingredient entering into the offense must be accurately and clearly set out, for it is an elementary principle of criminal pleading that where the definition of an offense, whether

at common law or by statute, includes generic terms, it will not be sufficient to charge the offense in the generic terms used in the definition, "it must state the species, it must descend to particulars." It is an inexorable requirement that every indictment must be so drawn as, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution on the same charge; second, to so inform the court of the facts alleged that it may decide whether they are sufficient in law to support a conviction if one should be had. For this facts are to be stated, not conclusions of law alone.

See 92 U. S. Reps. (Cruikshank *vs.* U. S.), page 44, head-note 12; also Justice Field's opinion, 100th U. S., pages 351 and 352.

And it is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor in the contemplation of its makers. Nor is this in any sense the substitution of the will of the judge for that of the legislator, for it very often happens that words of general meaning are used in the statute—words broad enough to include the act in question—and yet a consideration of the whole legislation, or of the circumstances that lead to its enactment, or of the absurd results which would follow from giving such broad meaning to the words of the statute, makes it unreasonable to hold that the legislator intended to include the particular act; and throughout the history of our jurisprudence the judges have collected the legislative intent, sometimes by considering the cause and necessity for making the law; sometimes by comparing one part of an act with another, and sometimes by resort to foreign circumstances, as was notably done

by this court in construing and applying the alien contract labor law.

See Holy Trinity Church *vs.* U. S., 143 U. S. Reps., pages 457 to 464, inclusive.

Oates *vs.* National Bank, 100th U. S. Reps., 239, 4th head-note.

Evans *vs.* U. S., 153d U. S. Reps., 584, 1st head-note.

Acts of Parliament are to be so construed as that no man who is innocent or free from injury or wrong be by a literal construction punished or endamaged (3d B. and Ald., 266 and 270).

To rightly interpret and apply the act of 1867 it will be necessary to determine as nearly as possible "the legislative intent" in its enactment, and in doing this the first step will be to ascertain and identify the mischief to be remedied, and to do this resort would ordinarily be had to the title of the act; but, as in this case, the title is very meagre, and, as the only descriptive word occurring in it designating the evil to be remedied is both generic and technical, as well as unfamiliar and foreign, very little aid can be drawn from an examination of its terms.

Turning next to the body of the act, it will be found that it also fails to define or identify the particular evil Congress was seeking to prohibit. True, it prohibits the holding of any person to service or labor under the system known as "peonage;" annuls all acts, laws, resolutions, etc., heretofore established or that may be hereafter established to enforce voluntary or involuntary service or labor for the liquidation of any debt or obligation or otherwise, but it nowhere defines the word "peonage." Failing, then, to find either in the title or in the body of the act any sufficient guide to the evil for remedying which the law was enacted, resort must be had to the events that preceded and attended its enact-

ment—"the historic situation" existing at the time the law was enacted.

See 143d U. S. Reps., pages 462 to 472, inclusive, (Holy Trinity Church *vs.* U. S.).

And as throwing light on the contemporaneous events that attended such enactment reference to the debates and proceedings in Congress about that time is both proper and profitable. On January 3, 1867, by a resolution offered by Senator Sumner, the Committee on the Judiciary was directed to consider whether any further legislation was needed to prevent enslavement of Indians in New Mexico or any system of peonage there, and especially to prohibit the employment of the Army of the United States in the surrender of persons claimed as peons; and with the resolution a letter from an assistant inspector general of the United States Army was read as follows:

LAS CRUCES, *Aug.* 22*d*, 1865.

The commanding officer of Fort Selden will allow and assist, if necessary, the bearer, Don Pedro Garcia, and retain and take in his charge his peon, Antonio Rodriguez, at said post.

By command of General Carleton.

(Signed) N. H. DAVIS,
Ass't Inspector General, U. S. Army.

Upon the introduction of the bill by Senator Wilson he was requested by several Senators to explain the meaning of the word "peonage," and in reply described it as "a condition of modified servitude which we have inherited from Mexico. It exists in New Mexico at this time, the only part of the country where I know it does exist. In some cases it is voluntary, but in most cases forcible * * * and what is more, officers of the United States, military and civil, have been carrying it out. The object of this bill is to arrest it—to make it the duty of the civil and military offi-

cers of the United States to put an end to the system and not support it. * * * A great many Indians are captured and forcibly held in servitude."

Senator Lane defined it "as a kind of servitude for debt, which the committee thought was inconsistent with our institutions. * * * The creditor cannot sell the peon, but he can transfer him as he would a mule or a horse, and give his services to anybody else."

See vol. 38, part 3, pages 1571 and 1572, Con. Globe.

In the course of the same discussion Senator Doolittle stated: "That almost always when one desires to hire out the first thing the laborer did was to get in debt to his master as deeply as he could and go and live with him. He had been informed, however, by the chief justice of the Territory that the territorial courts had decided against the power to hold these persons against their will, and they were not compelled to remain any longer than they desired to remain."

Idem, page 1572.

Six years before the system of peonage had been the subject of careful inquiry by Congress, and the most satisfactory account of it to be found anywhere is contained in the speech of Mr. Corwin on the report of the special committee of "thirty-three," which, among other things, contained the outline of an act for the admission of New Mexico into the Union. On presenting the report Mr. Corwin said: "I do not think it quite modest or proper for us at this time to indulge in any harsh criticisms on the ability of men anywhere to govern themselves. I am willing to trust the old Mexican and the old Spaniard of that country and the peon too. * * * I myself regarded the system of peonage as a great abuse until I came to inquire into it. I have fully understood it from gentlemen who have administered justice as judges in the courts of New Mexico. I find that it is a

voluntary contract entered into by one freeman to work a given length of time for another freeman: and instead of giving damages when the contracting party violates that contract, it is the law of that Territory to enforce the execution of the contract specifically. That is the whole of the system of peonage. I have no doubt from the long continuance of that system of labor by contract that it is very well adapted to the condition of that people; * * * It is their mode of labor. Instead of giving damages on the contract when the hired man refuses to perform his part of it * * * the courts say to the hired man, 'Work out honestly; fulfill the letter of your contract, and if this man who has advanced money to you for your necessities, or for any other object abuses you, the court is open; come before it and you will have redress.' Does anybody imagine a peon will be denied redress when it is remembered that he is a voter in that Territory?"

Life and Speeches of Thomas Corwin, pages 473 and 474.

The word "peon" is variously defined by the lexicographers as "a common laborer," "a day laborer," "a foot soldier," "a bondsman for debt," "a form of servitude existing in Spanish America," "a debtor held by his creditor in a qualified servitude to work out the debt," etc.

Much more recently Judge Thomas Jones, of the middle district of Alabama, in an opinion to be found on page 673 of 123d Federal Reporter, declares that "peonage was not slavery as it formerly existed in this country. The peon was not a slave. He was a freeman with political as well as civil rights. He entered into the relation from choice for a definite period as a result of a mutual contract. * * * The child of a peon did not become a peon. * * * The peon, male or female, agreed with the master on the nature of the service, the length of its duration and compensation. The peon then became bound to the master for an indebted-

ness founded upon an advancement in consideration of service." Now, whatever the true meaning of the word "peon" may be, it results from the precedents and opinions just cited that the purpose of Congress in passing the act of 1867 was specifically to abolish peonage in New Mexico and to punish persons practicing peonage in that Territory, and at the same time to make peonage unlawful throughout the United States. It is, however, a thing of vast significance that the act makes no provision whatever for its enforcement outside of the Territory of New Mexico.

The second section declares that it shall be the duty of all persons in the military or civil service in the Territory of New Mexico to aid in the enforcement of the first section of the act, a circumstance that seems conclusive that it was never intended to have practical application in the several States which have passed beyond the state of pupilage and wardship and been invested with the exclusive authority to protect the lives and liberties of their citizens.

Applying the doctrines and rules above referred to, how stands the indictment against Clyatt? The act under which it was framed, with all its prohibitions and penal sanctions, is directed against "a system," "an assemblage of things adjusted into a regular whole," "a regular union of principals or parts forming one entire thing."

In contemplation of the act of 1867, the holding of any person to service or labor in order to come within the purview of the act must be under "the system known as peonage," and it is the establishment or the attempt to establish or maintain such a system that is prohibited by the act; but the word "system" occurs nowhere in the indictment. It is true that in both its counts the words "condition of peonage" occur; but if a "condition" be but the result of a "system," then it was indispensable that the existence of a system leading to peonage should have been alleged in the indictment; and not only that, but the "system" should have been alleged to have existed in some particular State

or Territory of the United States. This view is confirmed by the language used in the second count of the indictment, "that he returned and aided and assisted in returning Will Gordon and another to a condition of peonage." "To return" means the act of coming or going back to the same place, the act or process of coming back to a former state; and yet the indictment nowhere alleges that any "system" of peonage or "any condition of peonage" existed anywhere or at any time to which return was assisted to be made or intended to be made. We therefore contend that to support a conviction upon the indictment in question it was necessary under the very terms of the statute that the coexistence of two things must have been alleged in the indictment and proved at the trial—the existence somewhere of a "system" or "condition" of peonage cotemporaneously with a return or an attempt to return some person or persons to that "system;" and without this the indictment is ill and the conviction unwarranted. This point is fully supported by a long line of judicial decisions, and is especially emphasized in the opinion of Justice Pardee, reported in Sixth Circuit Appeals, pages 462 and 464, which was a prosecution under the alien contract labor law of Congress, in which it was held that before conviction could be had under that law it was indispensable that the existence of a contract for labor be alleged in the indictment at the time of the payment or promise to pay wages to an alien for labor or service to be performed in this country.

Again, we insist that it was not only indispensable that the indictment should have alleged the existence at the time in some State or Territory of a system or condition of peonage, but it should have further charged that such system or condition existed by act, order, resolution, or usage of the particular State or Territory in which its existence was charged. To hold otherwise would inevitably lead to consequences both inconvenient and absurd, nor will it suffice to suggest that a single instance of the violation of the

liberty of a citizen in any State would establish or tend to establish the existence in that State of a regular system or a fixed condition instituted or connived at by the State itself, nor would the occurrence in any civilized State of any number of invasions of personal liberty establish, or tend to establish the existence by State authority of a "system" of invading the personal liberty of its citizens; otherwise the frequent occurrence in a particular community of homicide or burglary or any other crime could be relied on to establish the existence of systematic and habitual connivance with murderers and robbers.

It is further insisted that the indictment preferred against Clyatt is fatally defective, in that neither acquittal nor conviction under it would secure him against further prosecution upon the same facts. In it he is charged with having returned Will Gordon and Mose Ridley to a condition of peonage by forcibly returning them to work to and for Samuel M. Clyatt and others. The proof showed that Clyatt and the others charged with him were residing and carrying on work in the State of Georgia, so that neither Clyatt's conviction nor acquittal on the charge of returning the persons named to a condition of peonage in the county of Levy and State of Florida would exempt him from future prosecution for returning the same parties to a condition of peonage in the county of Berrien and State of Georgia.

See Cruikshank *vs.* U. S., 92d U. S. Supr. Reps., 44.

For the reasons above stated, and upon the authorities, we respectfully submit that no lawful judgment could have been rendered under the indictment and on the verdict found.

As to Matters of Fact.

We insist for plaintiff in error that the facts proved on the trial were wholly insufficient to support the verdict, and that it should have been set aside by the court on the motion for a new trial and upon each and all of the grounds assigned in said motion.

First. It clearly appeared from the evidence that Gordon and Ridley were arrested in Levy county, Florida, by a proper State officer, to wit, the deputy sheriff of that county, under warrants issued upon affidavits charging them with the crime of larceny, and that while being conveyed to jail, and after being informed that they would be held until a requisition could be obtained for their extradition to Georgia, they voluntarily elected to return to Georgia without requisition, and solicited the arresting officer to allow them to return at once to the State in which the warrants had been issued.

The grounds for the motion for new trial, as shown on pages 5 and 6 of the record and numbered 4, 5, 6, 7, 8, 11, and 12, should have been sustained, because there was no proof adduced on the trial that Will Gordon or Mose Ridley had on the 11th day of February, 1901, or at any other time, been held to service under the system known as peonage, nor was there any proof that they or either of them had been afterward held or returned to service under Samuel M. Clyatt or under any firm with which he was connected.

Second. Because the evidence wholly failed to show that either Gordon or Ridley ever rendered, or were subjected by the defendant, or by any one acting with him, to either voluntary or involuntary service or labor as peons to liquidate any obligation due to the defendant.

See testimony of James R. Dean, page 12, Transcript of Record; H. S. Sutton, page 13, W. E. Yearty, page 14, and E. T. Ford, page 16, Transcript of Record.

Third. It was error of law to admit, over the objection of defendant's attorney, the following testimony of H. S. Sutton: "It has been the universal custom and practice of the turpentine men in Georgia and Florida to go and take negroes whenever they wanted to in this way," for the reasons that no custom of the sort was alleged in the indictment; and if it had been alleged, proof of its existence would have been irrelevant and insufficient to bind the defendant in a criminal investigation.

Fourth. The allowance of this testimony of Sutton was also improper in that it tended to impeach the testimony of James R. Dean, a witness for the Government, who, when interrogated by the district attorney as to the existence of a general custom among turpentine men to swear out warrants for hands when they go away owing debts, and to have them arrested and returned, replied: "I do not know of the custom to swear out warrants; I never took out warrants myself."

See pages 12 and 13, Transcript of Record.

Nor was this error harmless to the defendant, inasmuch as had the indictment contained anything to put the defendant on notice that the existence of any such custom would be attempted to be proved at the trial, he would have been easily able to have successfully shown that no such custom existed; indeed it was shown, and plainly shown, by the record that neither Gordon nor Ridley was arrested for any debt, but upon warrants based on affidavits regularly sworn out and charging them with the crime of larceny, and the record further fails wholly to show that they or either of them afterward rendered service to Clyatt or to any other person, voluntary or involuntary, in order to liquidate a debt claimed against them or against either of them.

Britton *vs.* U. S., 108 Fed. Rep., page 199.

Fifth. The matter set out in the fourth ground of the motion for new trial and in the fifth assignment of error that sections 1990 and 5526 of the Revised Statutes have no application to the facts testified to at the trial will be noticed and discussed in that portion of the brief which undertakes to show that the act of March 2, 1867, is without warrant in the Constitution nor under any of the amendments thereto.

As to the Constitutionality of the Act of March 2, 1867.

We insist that this law is wholly invalid and without warrant for its enactment in the Constitution of the United States or in any of the amendments thereto, so far, at least, as concerns its application in any State of the Union. Hitherto the only authority for its enactment is claimed to be found in the thirteenth amendment to the Constitution, which declares that "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or in any place subject to their jurisdiction." In the next section of the amendment power is conferred on Congress "to enforce this article by appropriate legislation."

Comparing this amendment with the act of 1867, it is to be observed that the latter contains several terms widely different in significance and in effect from anything contained in the amendment. To illustrate, the first section of the act annuls "all orders, acts, resolutions, etc. of any State or Territory made to establish, or enforce directly or indirectly, the *voluntary*, or involuntary, service or labor of any persons as peons in liquidation of any debt, etc., or otherwise," and then proceeds somewhat vaguely to define and identify such voluntary or involuntary service with the "condition of peonage." It is therefore manifest from the mere reading of the act of 1867 that it prescribes in terms things neither prohibited nor condemned in the thirteenth amendment, and is therefore broader than the amendment, has no

warrant in the article of the Constitution by which it is claimed to be authorized, and is therefore void in toto. The case of the United States against Harris turned upon the constitutionality of section 5519 of the Revised Statutes. The indictment in that case charged that R. G. Harris and nineteen others "did conspire together with certain other persons, whose names are to the grand jurors unknown, for the purpose of depriving four citizens of the State of Tennessee of the equal protection of the laws," and then proceeds to set out that while these four citizens were under arrest and in the custody of a deputy sheriff they were violently taken by the defendants and by them beaten, wounded, and otherwise ill treated. Now, the act of April, 1871, articled as section 5519 of the Revised Statutes, although an essential part of the legislation enacted for securing equality of civil rights and of protection in all the States and Territories to the lately emancipated colored race, expressly included within its scope citizens of both the white and black races; and after fully canvassing the validity of section 5519, and finding no warrant in either the fourteenth or the fifteenth amendment of the Constitution, Justice Woods inquires whether authority is contained in the thirteenth amendment for the enactment of the law in question, and says, "The question with which we have to deal is, does the thirteenth amendment warrant the enactment of this section? We are of opinion that it does not. Our conclusion is based on the fact that the provisions of that section are broader than the thirteenth amendment would justify. Under that section it would be an offense for two or more white persons to conspire for the purpose of depriving another white person of the equal protection of the laws. It would be an offense for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen, or against another colored citizen who had never been a slave. Even if the amendment is held to be directed against the actions of private individuals, as well as against the action of the State

and the United States, the law under consideration covers cases both within and without the provisions of the amendment. It covers any conspiracy between any two free white men against another free white man to deprive him of any right accorded him by the laws of the State or United States. A law under which two or more white private citizens could be punished for conspiring for the purpose of depriving another free white citizen of a right accorded by a law of the State to all classes of persons—as, for instance, the right to make a contract, to bring a suit, or to give evidence—clearly cannot be authorized by the amendment, which simply prohibits slavery and involuntary servitude. Those provisions of the law which are broader than is warranted by the article of the Constitution by which they are supposed to be authorized *cannot be sustained.*

See U. S. *vs.* Harris, U. S. Reports, page 641.

In the case of James *vs.* Bowman, reported in 190 U. S. Reps., pages 127 to 142, inclusive, the validity of an indictment based on section 5507 of the Revised Statutes was in question, the charge being that certain "men of African descent, colored men and not white men, were by means of bribery, etc., unlawfully intimidated and prevented from voting at an election held in the fifth congressional district of Kentucky for the election of a representative in the Fifty-sixth Congress of the United States." Section 5507 prescribes a penalty against every person who prevents, hinders, etc., another from exercising the right of suffrage. Authority for this statute was claimed under the fifteenth amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States nor by any State on account of race, color," etc., and the second section of the amendment confers on Congress the power to enforce the amendment by appropriate legislation, and the single question presented was whether section 5507 could be upheld under either the fourteenth or the fifteenth

amendment of the Constitution, and, after concluding that no authority for its enactment could be found in the fourteenth amendment, Mr. Justice Brewer, passing to the consideration of its validity under the fifteenth amendment, said: "*It may be noticed that* this indictment charges no wrong done by the State of Kentucky, or by any one acting under its authority. The matter complained of was purely an individual act of the defendant, nor is it charged that the bribery was on account of race, color, or previous condition of servitude * * * They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color, etc., is charged. These authorities (100th U. S., 339; 92 U. S., 542; 109 U. S., 13 (2 U. S., 214, 217), show that a statute which purports to punish purely individual actions cannot be sustained as an appropriate exercise of the power conferred by the fifteenth amendment upon Congress to prevent action by the State through one or more of its official representatives. * * * It is earnestly contended, however, that Congress has ample power in respect to elections for Representatives in Congress; that the election at which this bribery took place was such an election, and that, therefore, under such general power this statute and this indictment can be sustained. The difficulty with this contention is that Congress has not by this section acted in the exercise of such power. It is not legislation in respect to elections of Federal officers, but is leveled at all elections, State or Federal. * * * On its face it is clearly an attempt to exercise power supposed to be conferred by the fifteenth amendment in respect to all elections. * * * To change this statute, enacted to punish bribery of persons named in the fifteenth amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation; it would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. * * * Courts are not at liberty to take a criminal

statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit."

See James *vs.* Bowman, pages 138–142, inclusive, 92 U. S., 214.

Trade-mark cases, 100th U. S., page 82.

Now, to apply the principles set out in these cases to the act of 1867, it is absolutely certain that the thirteenth amendment has no reference and contains no allusion to mere "service," but only provides that neither slavery nor involuntary servitude shall exist, etc. Surely it needs no argument to show that service and servitude are not synonymous terms, but are wholly different in meaning. The first is defined as "the act of serving or attendance in any sense, obedience, labor performed for another, assistance rendered, obligation conferred, etc."

See Cent. Dic., vol. 7, page 5517.

Whereas servitude is defined to be "the condition of a slave or servant; the state of subjection to a master; slavery; bondage," and carries with it the idea of compulsion; indeed, both in its definition and in its use the word carries with it the idea of enforced labor; but the section in question includes a prohibition and a penalty against "service," even though freely and voluntarily rendered to discharge an honest debt, thereby wholly transcending the legislative intent, as well as the authority actually conferred by the thirteenth amendment, and so strikes directly at, and practically destroys, the citizen's right to make contracts and to perform them when made—a civil right little less important and valuable than the right of personal liberty.

We therefore insist that section 5526 is unconstitutional and void on the identical ground upon which the indictment in Harrison's case was declared to be without author-

ity of the Constitution, nor can the occurrence in the act of the qualifying words " as peon," following immediately after the prohibition against the direct or indirect establishment of a system of voluntary or involuntary service or labor, have the effect to save the act from judicial condemnation. A similar contention has more than once failed to receive the approval of this court. In the U. S. *vs.* Reese, 92d U. S., page 221, the court says: " We are therefore directly called upon to decide whether a penal statute enacted by Congress with its limited powers, and which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can by judicial construction be so limited as to make it operate only on that which Congress may rightfully prohibit and punish. * * * We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional from that which is not. * * * There is no room for construction unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute, so as to make it specific, when as expressed it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. * * * To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." And we respectfully submit that if this court has not the power by construction to restrict and limit the scope of a penal statute, *a fortiori*, it has not the power by construction to enlarge and extend the scope of such a statute.

Sections 1990 and 5526 have no application either to the matters charged in the indictment or to the transactions proved at the trial. In support of this contention, we re-

spectfully submit that the debates in Congress at the time of the introduction and the passage of the act of 1867, the peculiar character of the mischief to be remedied, the language of the act itself, and the judicial determination by this court as to the scope and validity of all congressional enactments of like character with the act of 1867, and inspired by a like purpose, demonstrate that neither the conduct of Clyatt, as set out in the indictment and as illustrated and explained in the evidence, was such as to fall within the scope of the thirteenth amendment to the Constitution nor within the terms of the act of 1867, and that, if the right claimed to have been violated by the wrongs charged in the indictment existed at all, such right only existed as between two individual citizens of the State of Georgia or of the State of Florida, and such wrongs (if any were perpetrated) were committed by one private citizen against another, and their correction and punishment was a matter wholly within the jurisdiction of the courts of Florida or of Georgia. They were matters in which the General Government cannot and does not assume to act directly on the individual citizen. While the Constitution prohibits the establishment of any form of slavery by any State or in any Territory, either by legislative enactment, by executive order, or by resolution or by usage, yet, for the protection of the life and property and personal liberty of the individual citizen, he is remitted to and dependent upon the law of the State which primarily owes to him the duty of safeguarding these great rights of security, liberty, and property, and, to use the language of this court in a case involving this principle, "neither the fourteenth amendment nor the thirteenth amendment nor the fifteenth amendment to the Constitution adds one jot or tittle to the rights which one citizen has under the Constitution against another. Equality of the personal rights of citizens is a principle of republican government, and every such government is in duty bound to protect all its citizens in the unmolested enjoy-

ment of all these personal rights. But this duty was originally assumed by the States and with the States it still remains; the only obligation resting upon the General Government being to see to it that States and Territories do not deny these rights."

See 92 U. S. Supreme Court Reps., pages 548 and 559.

In the case of Converse, reported on page 632, 137 U. S. Reports, it was said: "We repeat, as has been so often said before, that the fourteenth amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, * * * but it was not designed to interfere with the power of the State to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudication of the courts of a State administering the process provided by the laws of a State."

See 137 U. S., page 632.

Again, in the case of Barbier *vs.* Conally, it was said: "Our jurisdiction is confined to a consideration of the Federal question involved, and which arises upon an alleged conflict between a certain section of the city ordinances of San Francisco with the first section of the fourteenth amendment, * * * and it would be an extraordinary usurpation of authority if a Federal tribunal should undertake to supervise a purely police regulation. The fourteenth amendment was only intended to prevent an arbitrary deprivation of life or liberty, or the arbitrary spoliation of property; * * * but the amendment, broad and comprehensive as it is, was not designed to interfere with the power of the State to prescribe regulations for promoting the health, morals, education, and good order of the people, and though the State or local government may be cumbersome, dilatory, and expensive, yet if no discrimination is made against any one, and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The in-

conveniences arising in the administration of its laws from such causes are matters entirely for the consideration of the State, and can be remedied only by the State."

See 113 U. S. Reports, pages 27 to 32.

And, again, in Kemler's case, in which the fourteenth amendment was under consideration, it was said: "This amendment did not radically change the whole theory of the relation of the State and Federal Governments towards each other, and of both governments towards the people. * * * Protection to life, liberty, and property rests primarily with the States * * * Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights * * * but it was never designed to interfere with the power of the State to protect the lives, liberty, and property of its citizens."

See 136 U. S. Reps., pages 448 and 449.

Now, surely this act of 1867 can derive no additional force nor have any special application on account of the fact that it embraces within its terms people of all colors and of every condition in life. Certainly it cannot by any sort of construction be deemed to have special reference to the fact that some who come within its scope may have once been slaves, without standing in the courts or any of the rights of citizens. Neither the act of 1867 nor the thirteenth amendment relates to citizens—that is, in a political or a popular sense. The thirteenth amendment does not, when rightly considered, undertake to create or confer any new right or privilege, but rather seeks to secure to all persons, of whatever race, color, or condition, the quiet and undisturbed enjoyment bestowed, not by the Constitution of the United States or of any particular State, or by any decree of any court or cabinet, but an original, natural right inherent by God and by nature in all persons. And the declaration

that "all men are by nature free," is but a recognition by the Fathers of this original, universal, and primary truth, which, with the right of freedom from arbitrary seizures and arrests, of security of life, liberty, and property, was no new assertion of the sanctity of the citizen's property and person, but rather a maxim that came down to us through Magna Charta and bills of right and petitions of right, and has found expression in every charter of human freedom, in every declaration of popular liberty.

And running through the whole line of the decisions of this court, from Reese and Cruikshank to Logan and Baldwin and Bowman, in which it was sought to lay down the precise boundary between the jurisdiction of the Federal court and the jurisdiction of the several States over individual invasions of the right of personal liberty, it seems clear that neither the thirteenth amendment to the Constitution nor the act of 1867 confers any original right—bestows any new privilege—but merely declared and sought to protect a right that existed already—a right fundamental and inherent in all men.

We submit, therefore, that on this point our contention comes squarely up to the test prescribed in Reese's case and in Cruikshank's case; commenting on which, Justice Gray, in Logan's case, says: "It was held in these cases that a conspiracy of individuals to injure, oppress and intimidate citizens of the United States with intent to deprive them of life and liberty without due process of law, did not come within the statute (sec. 5508) because the rights of life and liberty were not granted by the Constitution, but are natural and inalienable; and the constitutional amendment added nothing to the rights of one citizen as against another."

See Logan's case, 144 U. S., pages 287 to 293.

Again, in the Civil Rights cases, 109 U. S. Reports, it is held that the invasions of civil rights, including the natural right of personal liberty by State action, is the thing against

which the three amendments named, and all legislation had under them, is directed. And particularly as to the first section of the fourteenth amendment it is said: "It is State action of a particular character that is prohibited. Individual invasions of individual rights is not the subject-matter of this amendment. It has a deeper and a broader scope. It nullifies and makes void all State legislation and State action of every kind which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law * * * It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation: but to provide modes of relief against State legislation or State action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of State laws and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment * * * Its prohibitions are against State law and acts done under State authority * * * It is absurd to affirm that because the rights of life, liberty and property, which include all the civil rights that men have, are by the amendment sought to be protected against invasion on the part of the State without due process of law: Congress may therefore provide due process of law for their vindication in every case; and that because the denial by a State to any person of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation. That is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce. * * * If it is supposed that the States may deprive persons of life, liberty, and property without

due process of law, why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights."

See 109 U. S., page 11.

And we insist that the most cursory examination of the act of 1867 will satisfy any unbiased mind that it is like the amendments and acts discussed in the Civil Rights cases—wholly "corrective" in its character and purpose, and intended to furnish redress only against State laws, State resolutions, and customs countenanced and recognized by the State, and which tend to the establishment of a system of peonage.

See 109 U. S., bottom page 16.

And we submit confidently that, if the act of 1867 can have application anywhere outside of the Territories, such application must be directed and confined exclusively to State action—to the conduct of State officers acting under authority of the State, and not to the lawless conduct of individuals. For, says Justice Bradley in the case last above cited, "Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation. But if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

109 U. S. Reps., page 17.

The right of personal liberty therefore being a fundamental, natural right and not a right conferred by the Con-

stitution, but only guaranteed and secured by it, it follows that, if Justice Bradley was right in the opinion just quoted, the personal liberty of Gordon and Ridley could not possibly have been impaired by the acts of Clyatt unsupported by the State.

Some support has been claimed for the contention of the Government in this case from certain expressions contained in the opinion of Justice Bradley in the case last cited, in which it is intimated that under the thirteenth amendment Congress may have the power to legislate directly against individual invasions of the right of personal liberty, but it must not be overlooked that Justice Bradley in no part of that opinion intimated that such legislation had ever been enacted, although he was speaking sixteen years after the act of 1867 was passed; nor can any careful student of the case in question and of the Slaughter House case (16 Wallace, 72) fail to understand that these expressions were intended only to suggest that a citizen whose right of personal liberty had been invaded might, under the thirteenth amendment alone, invoke the jurisdiction of the Federal courts for his deliverance, for, unless this "self-executing quality" of the amendment, and the right to appeal to the Federal courts for deliverance from the peculiar sort of "bondage" known as peonage, were referred to, then that portion of the decision becomes unintelligible. Surely it was this "reflex character" and effect of the amendment that in several instances has been relied on by United States judges to deliver through the writ of *habeas corpus* persons deprived of their liberty under State laws or by individual invasion.

In view of the particular expressions contained in the opinion last referred to, and of the significant fact that the act of 1867 had been on the Federal statute book for nearly two decades when that opinion was delivered, it is certainly safe to assert that, whatever may be advanced in support of the abstract right of Congress under the thirteenth amendment to enact laws for punishing individual violations of

personal liberty in any State, one thing, at least, is certain, to wit, that Congress has not as yet undertaken to make such a law.

We insist, therefore, that it is established both upon reason and upon authority that the deprivations of personal liberty prohibited by the act of 1867 include only acts done under authority of a State government or of territorial laws or customs, and can only become subject to the penalties imposed by that law when actually perpetrated by some one clothed with and acting under color of State or territorial authority.

See 100 U. S. Rep., page 339, 3d head-note.

And, unless supported by such authority or in some way sanctioned by State law, such invasions of personal liberty are no more than the wrongful acts and trespasses of an individual or of individuals.

See 109 U. S. Rep., page 17.

And for these, protection both ample and convenient is provided by the constitutions and laws both of Florida and of Georgia. It will not, we apprehend, be suggested, even by such as may be ignorant of or for any reason out of sympathy with their laws and customs, that either of these civilized States have hitherto failed to provide under effective penalties against all individual violations of the liberties of their citizens, nor can it be truthfully alleged that the officers charged by law with the enforcement of those penalties and the safe-guarding of those rights ever have or ever will show themselves incompetent or unwilling to discharge their duties. The State of Georgia has incorporated in her bill of rights, and in the same language, the prohibition declared in the thirteenth amendment: "There shall be within the State of Georgia neither slavery nor involuntary servitude, save as a punishment for crime after legal conviction thereof."

"Protection to person and property is the paramount duty of government, and shall be impartial and complete." "No person shall be deprived of life, liberty or property except by due process of law." "There shall be no imprisonment for debt." "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State in person, by attorney, or both."

See secs. 5714, 5699, 5700, 5701, and 5718 Ga. Code.

And for the protection of the rights thus declared the courts of Georgia have ever been extremely jealous, and it was very recently held in a case which involved the validity of a contract for the subletting of convicts by an authorized "lessee company" to private parties to be worked at a saw-mill, was unauthorized as being "against public policy, violative of the Constitution, and from either a legal or a moral standpoint invalid and vicious, and that the private parties who had sought to become the beneficiaries of such a contract could only shield themselves from criminal prosecution for false imprisonment by the circumstance that a prior act of the legislature contained provisions which seemed to authorize, or at least to excuse, the subletting of convicts to private parties."

See Penitentiary Co. No. 2 *vs.* Rountree *et al.*, 113 Ga. Supreme Court Reports, pages 799 to 802.

Indeed the identical offense referred to in the indictment against Clyatt is substantially defined and punished in the Penal Code of Georgia, and for such violations of the liberties of its citizens a penalty of not less than four nor more than seven years in the penitentiary is imposed, this without the alternative of commuting the punishment by the payment of money.

See secs. 107 and 111, Ga. Penal Code.

The Commonwealth of Florida has thrown similar constitutional safeguards around the rights and liberties of her citizens, and in her Code of Laws has provided that "Whoever without lawful authority forcibly or secretly confines or imprisons another person within this State against his will, or confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State against his will, and whoever sells or in any manner transfers for any term the service or labor of any other person who has been unlawfully seized, taken, inveigled or kidnaped from this State to any other State, place, or country, shall be punished by imprisonment in the State prison not exceeding ten years."

See sec. 2399, Revised Statutes of Florida.

That the courts and officers of Florida have at no time been reluctant or remiss in the prosecution of offenders against this salutary law the recent records of her district and appellate courts abundantly testify, and it is within the personal knowledge of many citizens of that State and of the adjacent counties of Georgia that even since the indictment against Clyatt was preferred State officers of Georgia have been vigorously prosecuted for violations of the law contained in the section cited.

"The Historic Situation" as a Guide to the Legislative Intent.

In order to ascertain and identify the particular mischief sought to be remedied by penal statutes, resort to an examination of contemporaneous events, to the circumstances that preceded and attended their enactment, "the situation as it existed and as it was pressed upon the attention of the legislative body," is both proper and necessary. Nor has any method for interpreting statutes received higher commendation or more explicit approval by the courts and

judges of the United States; and it was only by resort to it that this court was enabled to rightly construe and properly apply the alien contract labor law of the United States. When a critical examination and analysis of both the title and the body of the act had failed to disclose with certainty the mischief it was designed to remedy, resort was had to the circumstances surrounding its enactment, the debates in Congress at the time of its introduction and passage, and the reports of committees of both houses, and then, passing beyond these sources of information, the court considered the cotemporaneous situation "of American life as expressed by its laws, its business, its customs, and its society," and from this concluded that "it was a case where there was presented a definite evil, in view of which the legislature used general terms, with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts under those circumstances to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute." And it was held that the act of Trinity Corporation, although expressly conceded to have been within the letter of the law, was neither within its spirit nor within the intention of its makers, and that the corporation was blameless, in face of the proven fact that its officers had made a contract with an alien residing in England, by the terms of which he was afterward to remove to the city of New York and enter into the service of the corporation.

See Holy Trinity Church *vs.* United States, 457 to 472, inclusive.

In view of the solemn judicial sanction thus given to this reasonable, necessary, and humane method of arriving at the meaning of penal statutes, how stands the attempt made in this case to draw within the jurisdiction of the United States court an alleged but unproved effort on the part of an individual citizen of one State to invade and violate the personal liberty of a citizen of another State? What possible relevancy or application could a law enacted thirty-six years ago for the purpose of correcting a mischief reported to have been introduced into a particular section of country that had recently been acquired by conquest and by treaty from Mexico, and was being openly practiced, and generally submitted to, by the inhabitants who, along with the acquired territory, had come within the jurisdiction of the United States, have to the laws and customs of a civilized State and to the manners of a people civilized, humane, and free? What place is there in a system such as ours for statutes to prohibit and penal sanctions to prevent the practice by our people of alien customs and usages, medieval in their origin and tolerated only for a time, chiefly because the people of the country where it prevailed had for centuries both practiced and submitted to it? Surely it would seem to all reasonable men that this effort to apply and enforce the prescriptions and sanctions of the act of 1867 at this day, and among a people about whose rights and liberties a free and enlightened Government has thrown manifold and sufficient safeguards, is but a grotesque anachronism, a palpable perversion of the real purpose of the law.

The Anti-peonage Law of 1867 *Subject to be Variously Construed and Impossible of Certainty in Its Enforcement.*

In an effort to defend the anti-peonage law against the criticism of vagueness and uncertainty as to its definitions and prohibitions of peonage, particularly that which points out the fault of being broader than the amendment authorizing

it, and that under the literal terms of the statute even service voluntarily rendered to liquidate a debt justly due would subject the one to whom the service was rendered to the pains and penalties of the act of 1867, it has been suggested that the use of the expression "as peons" in the first section of the act so qualifies the general expressions "voluntary or involuntary service or labor" as to relieve the law of uncertainty as to the sort of service or labor forbidden by it to be rendered.

Now we respectfully submit that, so far from relieving the statute from the objection urged, the explanation attempted, in fact, very greatly confirms and emphasises it, and this infirmity of the statute is finding strong and palpable illustration in the rulings and opinions of judges of the United States courts presiding in different sections of that portion of the country where up to this time prosecutions for peonage have been instituted and encouraged. It is true that the act prescribes that the service—be it voluntary or involuntary—must be rendered by those held to it "as peons." But how and by whom is it to be determined when service, either voluntary or involuntary, has been rendered by persons serving "as peons"? Surely the liberties of the citizen could never have been left at the mercy either of a statute incapable of definite construction or of the varying views of different judges; and already this identical trouble has arisen in the effort by different judges of the United States courts to interpret and apply the anti-peonage law.

For conduct not essentially dissimilar, two citizens of Georgia have been prosecuted for violating this law, one in the United States court for the eastern division of the southern district of Georgia, the other in the United States circuit court for the northern district of Georgia, and the indictments were in both cases demurred to upon substantially the same ground. In the first the demurrer was overruled; in the other it was promptly sustained and the accused citizen discharged, Judge Newman, of the north-

ern district, holding that the act of 1867 "is inapplicable in Georgia, and, even if applicable there, the facts set out in the indictment are not such as to make a case under it. To merely characterize acts in restraint of personal liberty as peonage, is not sufficient to make them such, certainly not under this act of Congress."

See U. S. *vs.* Eberhart *et al.*, vol. 127, No. 1, pamphlet form, Federal Reporter.

In the other case the presiding judge for the southern district of Georgia, with equal promptness and perfect confidence, overruled the demurrer and held the accused party to trial. Surely it is of vast importance that the precise meaning and purpose of the anti-peonage law be speedily determined and declared.

We therefore respectfully submit, upon the principles and precedents above insisted upon and cited, that each and all of the questions certified from the United States circuit court of appeals for the fifth circuit should be answered in the negative.

Respectfully submitted.

W. M. HAMMOND,
Attorney for Plaintiff in Error.

A. O. BACON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 235.

SAMUEL M. GLYATT

v.

THE UNITED STATES.

ON CERTIFICATE FOR INSTRUCTIONS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

W. G. BRANTLEY,
A. C. BAGBY,
W. M. HAMMOND,
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1916

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 235.

SAMUEL M. CLYATT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON A CERTIFICATE FOR INSTRUCTIONS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The First Proposition Urged.

We submit, first, THAT UNDER A REASONABLE AND PROPER CONSTRUCTION OF THE ACT OF 1867, IN ORDER TO AUTHORIZE THE CONVICTION OF ONE FOR RETURNING ANOTHER TO A CONDITION OF PEONAGE, IT IS NECESSARY TO ALLEGE IN THE INDICTMENT AND TO SHOW BY PROOF THE EXISTENCE OF SOME "ACT, RESOLUTION, ORDER, REGULATION, OR USAGE" OF THE STATE WHERE THE OFFENSE IS ALLEGED TO HAVE BEEN COMMITTED "BY VIRTUE OF WHICH" said "RETURN TO A CONDITION OF PEONAGE" WAS AUTHORIZED, PERMITTED, OR SANCTIONED.

In the case at bar the Government relies upon section 5526, R. S., to sustain the conviction had. Said section reads as follows:

"SEC. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

Now, the language of said section is ambiguous. It affords no definition of what is meant by a "condition of peonage." As a matter of fact, the section quoted is but a part of the first section of the act of 1867, and the elementary rules of construction authorize and require that the section quoted be read in connection with the entire act in the effort to ascertain its exact meaning.

Mr. Justice Harlan in Neal *vs.* Clark, 95 U. S., 708, says:

"It is a familiar rule in the interpretation of written instruments and statutes, that 'a passage will be best interpreted by reference to that which precedes and follows it,' so also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.'"

Again, in Kohlsaat *vs.* Murphy, reported in 96 U. S., pages 159–160, it is said—Mr. Justice Clifford delivering the opinion:

"In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every part of the same; and where there are several statutes, relating to the same subject, they are all to be taken together and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object, and as appertaining to the same system."

"Resort may be had to every part of a statute, or where there is more than one in *pari materia* to the whole system

for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent."

Again, Mr. Justice Strong in Market Co. *vs.* Hoffman, 101 U. S., 115, says:

"We are not at liberty to construe any statute, so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, sect. 2, it was said that 'A statute ought upon the whole to be so construed that, if it can be prevented, no clause, sentence or word, shall be superfluous, void or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is, that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Following these rules of construction, not only permitted but required to be followed, we thus find that what is now section 1990 of the Revised Statutes was and is the first part of section 1 of the act of 1867, immediately preceding that part of section 1, which is now section 5526 of the Revised Statutes.

For convenience of reference we cite said section 1 of the act of 1867, as follows:

"That the holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States, and all acts, laws, resolutions, orders, regulations or usages of the Territory of New Mexico, or of any other Territory or State of the United States which have heretofore established, maintained or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons in liquidation of any debt or obligation, or otherwise, be and the same are hereby declared null and void; } Section 1990.

and any person or persons who shall hold, arrest or return, or cause to be held, arrested or returned, or in any other manner aid in the arrest or return of any person or persons to a condition of peonage, shall, upon conviction, be punished by fine, not less than $1,000 nor more than $5,000, or by imprisonment not less than one year nor more than five years or both in the discretion of the court." } Section 5526.

The language in section 5526 thus appears to be so closely connected with the language of section 1990 as to have no period intervening. Section 5526 is but a continuation of section 1990, and it is very easy, by merely reading section 1990, to determine the meaning of the "condition of peonage" mentioned in section 5526, at least to the extent of ascertaining one of its very essential ingredients, and one without which it cannot exist. A "condition of peonage," as the term is used in section 5526, means that state or condition of a person who is held to voluntary or involuntary service or labor, as a peon, in liquidation of a debt, or obli-

gation, or otherwise, and so held "by virtue" of some "act, law, resolution, order, regulation or usage" of his State, by which the act of the party holding him is justified or by, which the right of said party to hold him is "established, maintained or enforced."

This holding of one party by another to service or labor, as a peon, in liquidation of a debt or obligation, or otherwise, is also described in section 1990 as "the system known as peonage," and it is this "system" that is abolished. It is the acts, laws, etc., establishing, maintaining, or enforcing this "system" that are made null and void. It is the "holding of any person to service or labor under the system" that is made unlawful. It is manifest, therefore, that under the very letter of section 1 of the act of 1867 (5526 and 1990, R. S.) the person who is to be punished for "returning" another to a condition of peonage is the one who returns him "under the system," and it is equally clear that the "system" referred to in the law cannot exist except by virtue of an "act, law, resolution, order, regulation, or usage" of the State. Section 1 of the act of 1867 begins with the declaration "That the holding of any person to service or labor *under the system* known as peonage is hereby declared to be unlawful."

No punishment is prescribed for this "unlawful" act of the individual, and this is the only act of an individual that is made unlawful in said section until the last of the section, and there we find the punishment set out, and said provisions for punishment now form section 5526. It seems perfectly clear that this punishment of the individual thus provided for relates back to the only act of the individual that the section makes unlawful, to wit, the "holding" of a person to service or labor "under the system known as peonage." Thus we submit that our first proposition, to the effect that the indictment must allege and the proof must show a "system of peonage" established, maintained, or enforced by the State before one can be legally convicted of

the offense of "returning to a condition of peonage," is sustained.

There are other well-recognized rules of construction that will be helpful in arriving at the exact meaning of every word used in the entire act of 1867. Resort may be had to the debates in Congress, preceding the passage of the law in question. (The briefs of both the plaintiff in error and the United States, heretofore filed, quote from the debates in the Senate while the act of 1867 was being formulated.) Resort may be had to the title of the act. Resort may be had to "the historic situation" at the time the law was enacted—143 U. S., 462.

Proceeding under these other rules, we find legislative acts of the Territory of New Mexico passed in 1851, 1853, and 1859 creating the "system of peonage." These acts authorize and permit contracts for personal service to be entered into and provide for their enforcement. Section 1 of the act of 1851 says these contracts "shall be respected and enforced by the civil law according to the agreements made by their own free and voluntary will, which free will is based upon the obligations of natural rights and consequently gives room to exact the fulfilment of said obligations before the proper tribunals, according to the conditions that are solemnly and mutually stipulated in the contract, the person bound to serve giving his personal labor, and the master by paying him his salary, be it in advance or after rendering the service."

None of the acts compel or require any person to enter into one of these contracts. The contract is freely and voluntarily made under the theory of the law, but, once made, the law compels a compliance with its terms.

Section 16 of the act of 1851 says:

"All free white men and women not embarrassed by law or other reasonable causes may celebrate this species of contract."

Section 12 provides:

"When a servant runs off, his master may present himself before any authority, and take out a warrant of the debt, and with it may proceed in person or otherwise to any part of the Territory and make his claim, which shall be attended to, according to law."

In the act of 1853, section 2 provides that if the servant refuse to comply with the contract and he owes any part of the money to his master and refuses to pay it, judgment may be had against him, "it being the duty of the judge, or court in case of difficulty to order the sheriff to contract the services of said person to the highest bidder for the purpose of recovering the debt."

In the case of Jaremillo *vs.* Romero, 1 New Mexico Reports, p. 206, Judge Benedict, after reciting the foregoing acts, said:

"This system we find to be the peon system of the country."

The title of the act of 1867 is: "An act to abolish and forever prohibit *the* system of peonage in the Territory of New Mexico and other parts of the United States;" the body of the act refers specifically to the "laws" of New Mexico, and section 2 of the act says:

"That it shall be the duty of all persons in the military or civil service in the Territory of New Mexico to aid in the enforcement of the foregoing section."

Senator Wilson, the author of the act, said in the Senate debates, in speaking of peonage:

"It exists in New Mexico at this time, *the only part of the country where I know it does exist.*"

It is therefore established that the "system of peonage" Congress proposed to prohibit was *the* system in New Mexico. This system was created by law. A peon had a distinct

legal status, and a "condition of peonage" was of necessity a legal status also.

Now, with this information, let us see what Congress undertook to do, and did, by the act of 1867.

We first notice that the act of Congress did not *deal with* merely the voluntary or involuntary service or labor to pay a debt, but it qualified or limited that sort of service or labor to cases where the parties rendered it "as peons." Congress was dealing with the *contracts* for service or labor to pay a debt, which contracts could be enforced by the peonage law. If there was no contract to labor, the labor could not be exacted by law and there could be no peonage. Congress had no concern with cases of debt and voluntary labor to pay it, or involuntary labor for that matter, where there was no contract and no *legal compulsion*, on the party to labor. It was, therefore, that Congress put in the words "as peons" so as to cover those cases and only those cases where there was legal compulsion to labor. Congress also used the term "voluntary service or labor" to cover the contracts for service or labor which under the laws of Mexico were "voluntarily" entered into. The term "voluntary" described the nature of the contract. Congress then put in the word "involuntary," because, as we learn from the Senate debates, peonage, while voluntary under the law of New Mexico, was, nevertheless, sometimes forcible. The statement was made by Senator Wilson that "a great many Indians are captured and forcibly held in servitude." It was to meet peonage of that sort that the term "involuntary" was used.

Congress used the words "acts" and "laws" to cover the New Mexico statutes. It used the words "regulations" and "usages" to cover the cases of forcible seizure of Indians, which seizure appears to have been permitted by the authorities. It used the terms "resolutions" and "orders" to meet the conditions that Congress had chiefly in mind, to wit, the acts and conduct of army officers.

The debates showed that army officers issued "orders,"

which "orders" are set out in the debates for their subordinates to aid masters in having their fleeing "peons" returned to them. These orders give us a most accurate insight into the meaning Congress intended the words "arrest" and "return" to have, as, indeed, the peonage statutes of New Mexico do. When a peon fled from his contract or his master he was "arrested" by legal process and "returned" to fulfill his contract. Army officers aided in the "arrest" and "return" of "peons" to their masters. It was, therefore, that Congress used these terms. It will be noted, too, that Congress did not stop with making unlawful the acts, laws, etc., that maintained, etc., the voluntary or involuntary service or labor to pay a debt or obligation, but added thereto the words "or otherwise," so that the holding to service or labor was not limited to service or labor to pay a debt. It could be for any other purpose. It will be observed, however, that throughout the act, it is the law, act, resolution, order, regulation, or usage, by "virtue of which" there is maintained the service or labor of another as a peon, whether to pay a debt or otherwise, that is made null and void. It is not the holding of a person to voluntary service or labor, whether to pay a debt or otherwise, but it is such a holding "under the system" that is made unlawful. It is the law or usage "by virtue of which" the right to such a holding is established, maintained, or enforced that is made invalid These various kinds of holdings, as set out in the act, describe the "system" of peonage, that the act in the beginning makes unlawful. They explain what is meant by the "holding of any person to service or labor under the system known as peonage." It is the individual act of "holding" under this "system" that is made unlawful and that in the latter part of the first section (5526, R. S.) is punished. The penal provision not only punishes the "holding," but also punishes the "arresting" and "returning" to a holding under the "system." These suggestions confirm our first proposition, that the ex-

istence of a "system of peonage" by virtue of law, usage, etc., of the State is necessary to be charged and proved, before a legal conviction for the offense of returning another to a condition of peonage, as that offense is described in the act of 1867, can be sustained.

If these conclusions be correct it follows that, assuming the act of 1867 to be a valid law, the second question propounded by the honorable the circuit court of appeals should be answered in the negative, and likewise the third, for the indictment to which the third question is directed contains therein no reference to any "system" of peonage, or any law or usage sanctioning same.

It also follows that, as appears from the "Transcript of Record" now in the case, no proof of any law, usage, custom, etc., sanctioning or permitting peonage was proven. The honorable Attorney General in the oral argument conceded that no sufficient proof of a custom or usage sanctioning peonage was proved. Clyatt, therefore, should have his liberty on the record.

Our Second Proposition.

WE SUBMIT THAT THE ACT OF 1867 MUST FAIL; THAT IT IS AN INVALID LAW, SO FAR AS THE STATES ARE CONCERNED, BECAUSE IT IS IN EXCESS OF THE POWER OF CONGRESS. The only authority for its enactment, so far as the States are concerned, is the thirteenth amendment. The act makes "the holding of any person to service or labor under the system known as peonage" unlawful, and prohibits and abolishes it. Now, if peonage, or the system of peonage, be slavery or involuntary servitude, this provision of the act is constitutional, otherwise it is not. The historical accounts of peonage show that it is sometimes a voluntary service. The laws of New Mexico show that the service is voluntary in the beginning, and may continue voluntarily throughout the service. Unquestionably in the beginning of the service,

and until such time as the "peon" may seek to get away from his master, and is then involuntarily held, the service rendered is purely voluntary; and yet, if the master has made an advancement of wages, and the peon has entered upon his work freely and voluntarily, the "holding" has commenced, and this kind of "holding" is made unlawful by the act of 1867, and is unauthorized by the thirteenth amendment.

In 16 Wallace, 72, Mr. Justice Miller said:

"If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our Territory the amendment may safely be trusted to make it void."

The implication there is that "peonage" might develop into slavery or involuntary servitude, but that "peonage" is not necessarily either of these things.

In the Life and Speeches of Thomas Corwin, pages 473 and 474, appears his opinion that peonage is a voluntary institution of beneficent purposes. The act of 1867 makes all kinds of peonage, whether voluntary or involuntary, unlawful, and this was beyond the power of Congress, at least so far as the States are concerned, and we are dealing with the act as a State law, for it has been enforced as a State law in the case at bar.

The act also makes void the law of a State whereby the *voluntary service or labor* of any person in liquidation of a debt is established or maintained. This is so palpably beyond the power of Congress as to require no argument to so show.

The act nowhere uses the word "servitude;" it uses the word "service." They are not synonymous words, but have entirely different meanings. The synonym for "servitude" is "bondage." The word "servitude" is authorized by the thirteenth amendment. The word "service" is not.

The use of the words "or otherwise" can be legitimately

construed to mean that the act makes void any law of a State whereby the "involuntary service or labor" of any person *for any purpose* would be void. This would be to prohibit penal servitude for a crime, for the act does not specify labor or service "for another." The language is broad and general enough to include the State.

The act, therefore, is clearly broader than is authorized by the thirteenth amendment and the whole law must fail.

Reese case, 92 U. S., 214.
Harris case, 106 U. S., 624.
James *vs.* Bowman, 190 U. S., 127.

If it shall be contended, however, that the use of the words "as peons" qualify the expressions "voluntary service" and "or otherwise," the result will be to make the law so vicious that it cannot stand. Who will determine when one party working for another voluntarily to pay a debt is a "peon" and when he is not? Who will determine at what stage the work becomes so involuntary as to constitute it the labor of "a peon"? Who will determine when working for another not to pay a debt but "otherwise" constitutes such a person a "peon"? The act lays down no rule for the determination of these questions. They will have to be left to the courts for determination, and the result will be the substituting of judicial interpretation for legislative enactment. This will be to "set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." Just such a law was condemned in the Reese case, 92 U. S., 221, and we submit it should be condemned here. The viciousness of this very law in this regard is illustrated by comparing the case at bar, as shown by the "Transcript of Record," with the case of U. S. *vs.* Eberhardt *et al.*, vol. 127, No. 1, pamphlet form, Federal Reporter. On not very dissimilar facts, one judge held "peonage" existed, the other that it did not.

In the oral argument the honorable Attorney General, in reply to these criticisms of that part of section 1 of the act of 1867, found in section 1990, suggested that section 1990 was "unconstitutional or unnecessary." As we understood it, his contention was that section 5526 is a complete law in itself and that no other part of the act of 1867 is necessary to its validity. We submit, however, that there is no authority of construction that justifies the extracting of that part of the act of 1867 found in section 5526 from the body of the act, and eliminating the balance of the act, as either unconstitutional or unnecessary. The entire act relates to one subject, to one general scheme of prohibiting the "system of peonage." Each part of the act is necessary to the other part, if the legislative intent is to be upheld. There is no way to separate the good from the bad in the act, and if a part of the act is bad, because it is in excess of the power of Congress, the entire act must fail. The "condition of peonage," which the returning of another to is punished by section 5526, is shown, by what precedes it in the act, to embrace and include within its definition things within and things without the power of Congress. Can the courts change the legislative intent and limit the meaning of "condition of peonage" to those things only that are within the power of Congress? We submit not. In the Reese case, 92 U. S., 221, the court said: "We are therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statutes as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that

are in the section, but by inserting those that are not now there." Under this rule, in order to make section 5526 constitutional, words that are not there must be inserted. "Condition of peonage" must be qualified by preceding it with the word "involuntary;" it must be further qualified by adding to it "except penal servitude as a punishment for crime." These qualifications are necessary to make section 5526 within the constitutional power of Congress. There are no words in section 5526 that by striking them out the section can be left constitutional. In order to make the section valid, words have to be introduced, and this, we have seen, cannot be done.

In the Reese case, just quoted, the act there in question was directed against those who by force, bribery, etc., hinder, delay, etc., "any person" from "qualifying or voting." The construction of the statute hinged on the words "any person." Congress had the power to punish those who discriminated against the African; who hindered or delayed, etc., the African *because he is an African*. Congress had no power to punish those who hindered, delayed, etc., a white man. The act therefore included that which was within and that which was without the power of Congress, and the entire act failed. So in the Harris case, 106 U. S., 629, the act there in question was directed against those who conspired to deprive "any person" of the equal protection of the laws. Congress had the power to punish those who conspired to deprive the African, because he is an African, of the protection of the laws of the United States, but had no power to punish such a conspiracy against a white man. The act, therefore, included that which was within and that which was without the power of Congress, and the entire act failed. Now, in those cases it would have been easier, certainly as easy, to have said that the intention of Congress in those two acts was to protect the African, and so limit and qualify the words "any person," than it will be to say that Congress, by a "condition of

peonage," meant only "involuntary" peonage, and that Congress had no intention of prohibiting a State from exacting "involuntary service" as a punishment for crime.

This honorable court, however, refused to so qualify the words "any person," and upon identically the same reasons for so refusing to do we submit that the words "condition of peonage" cannot be qualified so as to bring the act of 1867 within the constitutional power of Congress, and the whole act must fail, so far as concerns the States.

We submit further that if the proposition of the honorable Attorney General, that section 1990 is "unconstitutional or unnecessary," be conceded, and section 5526 be allowed to stand alone, the result will be to have a law prohibiting the holding, arrest, or returning of another to a "condition of peonage" without any legislative definition whatsoever of what is meant by a "condition of peonage," and the very essence of the crime in each case would be left to judicial interpretation and determination. The result will be the entire substitution of judicial interpretation for legislative enactment in the *definition* of the crime itself. The law will be ambiguous and uncertain. It will make of the law the "net" large enough to bring all in and leave the courts to say who shall be held and who shall be set free, that we have seen this honorable court has condemned.

On the authority of the Reese case in 92 U. S., 221, we therefore submit that section 5526, standing alone as a separate and independent enactment of Congress, would be invalid. This brings us to our

Third Proposition.

In our first proposition we undertook to demonstrate that the act of 1867, in its reference to States, applied only to "acts, laws, resolutions, orders, regulations or usages" of the State "by virtue of which" a system of peonage was "established, maintained or enforced," and that the act made such

"acts, laws, etc." void. If this be true, it is our contention, assuming the law to be valid, that the only individual in the States who could be punished under the act would be the one who "held, arrested, or returned another to a condition of peonage" under color of or by virtue of such "acts, laws, etc." Hence the necessity, as we insisted, of alleging and proving the existence of the "system" of peonage so maintained, established, or enforced before the allegation of "returning to a condition of peonage" can be maintained. We now submit that IF SECTION 5526, AS IT IS FOUND IN THE ACT OF 1867, DOES NOT REQUIRE THE EXISTENCE OF A "SYSTEM" OF PEONAGE, ESTABLISHED, MAINTAINED, OR ENFORCED BY VIRTUE OF SOME ACT, LAW, RESOLUTION, ORDER, REGULATION, OR USAGE OF THE STATE AS A CONDITION PRECEDENT TO CONVICTING ONE IN A STATE OF THE OFFENSE OF RETURNING ANOTHER TO A CONDITION OF PEONAGE, AND DOES NOT REQUIRE SUCH RETURNING TO A CONDITION OF PEONAGE TO BE CHARGED AND PROVEN TO BE IN PURSUANCE OF, OR BY VIRTUE OF, SUCH ACT, LAW, RESOLUTION, ORDER, REGULATION, OR USAGE, THEN SECTION 5526 IS AN INVALID LAW AND THE ACT OF 1867 IS AN INVALID LAW, SO FAR AS THE STATES ARE CONCERNED, EVEN THOUGH THEY BE VALID LAWS AS TO THE TERRITORIES, UNDER THE PLENARY POWER OF CONGRESS, FOR THE LAW AS THUS LIMITED AND THUS CONSTRUED IS A PROPOSAL BY CONGRESS TO PUNISH THE MERE LAWLESS ACT OF ONE INDIVIDUAL AGAINST ANOTHER IN THE STATE—WHICH ACT IS UNSUPPORTED BY ANY LAW OR USAGE SANCTIONED BY THE STATE, AND IT MAY BE IN DIRECT VIOLATION OF THE LAWS OF THE STATE, WHICH PUNISHMENT IS BEYOND THE POWER OF CONGRESS TO IMPOSE.

The honorable Attorney General, by his brief and in his oral argument, maintained that under section 5526 Congress has the power to punish one individual who forcibly holds another to labor or service to pay a debt, and who does so of his own lawless desire and without the support of any statute or usage in his State. The position is further

broadly asserted that the existence of any "system of peonage" maintained or enforced by statute or usage in the State is unnecessary to be shown, and, insisting that such is the true construction and meaning of section 5526, the assertion is further broadly made that said section is within the constitutional power of Congress.

We understand the argument of the honorable Attorney General to be:

1st. The thirteenth amendment prohibits involuntary servitude.

2d. Peonage is involuntary servitude.

3d. Congress may legislate directly against the individual, whether his acts be sanctioned by State legislation or not, so far as may be necessary to eradicate all forms and incidents of involuntary servitude.

4th. The holding to labor or service to pay a debt is one of the incidents of peonage and consequently of involuntary servitude.

5th. Congress may therefore legislate directly against the individual who, as an individual, holds another to labor or service to pay a debt.

Now, if we have correctly understood the argument of the honorable Attorney General, we submit, with the utmost respect, that said argument is entirely fallacious. His entire argument, written and oral, as we understand it, stresses the *purpose* of the holding to labor, to wit: TO PAY A DEBT. The debt—the relation of debtor and creditor—appears to be the one distinctive thing necessary to make the holding an "incident" of "peonage," according to his argument, and is the one distinctive thing, therefore, that, more than any other, sustains the validity of the law.

We submit that if a debt is necessary to make the "holding" prohibited by the act of 1867 unlawful, and the validity of the act of 1867 is to be determined by the fact that the holding to labor or service that is prohibited by its terms is a holding to service or labor to *pay a debt*, then the act is invalid under the Reese and Harris cases quoted, because it prohibits the holding to service or labor "in liquidation of any debt or obligation *or otherwise*." If the constitutional power of Congress be limited to punishing the holding to labor or service TO PAY A DEBT, this act is broader than the power of Congress, for it prohibits the holding to service or labor *for any purpose*.

We submit, however, that the argument of the honorable Attorney General, as we understand it, is fallacious, because the element of debt illustrates nothing as to the power of Congress. The PURPOSE of holding another to service or labor, whether it be to collect a just debt, or to rob the party held of the value of his labor, or for the purpose of hatred or revenge, or for any other purpose, has no bearing upon the question as to the meaning of the thirteenth amendment, or as to the power of Congress under said amendment. It is the *character* of the holding, and not its *purpose*, that determines whether or not the prohibition is within the constitutional authority of Congress.

The thirteenth amendment prohibits slavery and involuntary servitude, except as a punishment for crime, and whether or not the holding by one individual of another to labor or service to pay a debt is a violation of the thirteenth amendment depends upon the *character* of the holding—depends upon whether or not it is involuntary servitude—and does not, in the slightest degree, depend upon the *purpose* for which the holding is maintained.

It will be conceded that personal chastisement of the slave by the master was an "incident" of slavery, but the honorable Attorney General will hardly contend that by reason of this "incident" Congress has jurisdiction to punish an in-

dividual who lawlessly assaults the person of another, at a time and at a place where no slavery exists.

We are met in this case with the clear, clean-cut proposition that where an individual is held to service or labor to pay a debt by another individual, whose act in so holding him is lawless and unsupported by any State law or usage, and who, in so holding him, acts without any authority of State government, and who in his own person exercises no public function, nor wields any power or authority under the State government, that the person so held is in a state of involuntary servitude within the meaning of the thirteenth amendment.

Upon the maintenance of this proposition, the Government's case against Clyatt rests. The Government construes the act of 1867 to sustain this proposition. We submit that if the Government has rightly construed the act of 1867, then it must maintain the proposition just advanced, or the entire act of 1867, as it is construed by them, must fail as being beyond the power of *Congress*.

OUR PROPOSITION IS, THAT WHILE THE PERSON SO HELD WOULD NECESSARILY BE HELD INVOLUNTARILY, YET THAT THE HOLDING WOULD NOT CONSTITUTE INVOLUNTARY SERVITUDE WITHIN THE MEANING OF THE THIRTEENTH AMENDMENT, AND WOULD NOT BECAUSE IT WOULD BE A HOLDING WITHOUT THE SANCTION OF ANY LAW OR OF ANY GOVERNMENT THROUGH OR BY ITS CUSTOMS, LAWS, OR AGENCIES, AND WOULD BE SUCH A HOLDING AS WOULD NOT TAKE AWAY FROM THE PARTY HELD, OR IMPAIR IN THE SLIGHTEST DEGREE, THE RIGHT OF SUCH PARTY TO HIS LIBERTY.

This brings us directly to the question as to what is meant by "involuntary servitude" as the term is used in the thirteenth amendment. The authorities are abundant that the term applies to a compulsory restraint of liberty, or a re-

straint that is imposed by some government or permitted by some government, through its laws, its usages, or its agencies. It has no reference to the lawless act of one individual who trespasses upon the liberty of another.

All the authorities agree that the thirteenth amendment deals primarily with slavery. The abolition of slavery was the main purpose of the amendment. The term "involuntary servitude" being used in connection with "slavery," we get some idea as to its meaning by ascertaining the meaning of "slavery."

In the Civil Rights cases in 109 U. S., Mr. Justice Bradley said:

"Slavery cannot exist without law any more than property in lands and goods can exist without law."

The Government in the case at bar concedes that slavery cannot exist without law, so that it is unnecessary to cite further authorities on that proposition.

In discussing the thirteenth amendment Judge Cooley, in his "Principles of Constitutional Law," page 237, said:

"The word slavery in this country has acquired a somewhat technical meaning and is limited to that sort of servitude which has prevailed under the State laws, namely, to servitude for life. The prohibition of slavery might, therefore, seem to be limited to this sort of service, leaving the *legislative authorities to* establish a compulsory service for terms of years at discretion. Indeed such servitude had existed in the early history of the country in cases of immigrants, known as redemptioners, and of some others, and it would be easy to suggest exceptional cases in which excuses might exist to *enact laws* for compulsory service, were the *legislature so* disposed. It was deemed important, therefore, that the prohibition should include, not slavery merely, but all classes of involuntary servitude not imposed as a punishment."

This is about as clear as the statement could be put, that in the opinion of Judge Cooley the servitude named in the

thirteenth amendment was some form of servitude imposed by law.

In the Slaughter House case in 16 Wallace, page 69, in speaking of the thirteenth amendment, Mr. Justice Miller said:

"That a personal servitude was meant is proved by the use of the word 'involuntary,' which can only apply to human beings. THE EXCEPTION OF SERVITUDE AS A PUNISHMENT FOR CRIME GIVES AN IDEA OF THE CLASS OF SERVITUDE THAT IS MEANT."

It is conceded that servitude as a punishment for crime can only be imposed through law or by government of some kind. We are, therefore, to understand from the language quoted that the class of servitude referred to in the amendment is that imposed through law or government.

Mr. Justice Miller further said in the same connection:

"Servitude is of larger meaning than slavery, as the latter is popularly understood in this country and the obvious purpose was to forbid all shades and conditions of African slavery."

It is conceded that slavery cannot exist without law, and the word "servitude," being intended to cover all shades and conditions of African slavery, was meant to include all forms of slavery or servitude *imposed by law.*

Mr. Justice Miller further said in the same connection:

"It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India islands on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of this article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, *held under a law* of Maryland liberated by Chief Justice Chase on a *habeas corpus* under this article, illustrates this course of observation, and it is all that we deem necessary to say on the application of that article to the statute of Louisiana now under consideration."

Note again the distinct reference to servitude as something created by law. The regulating of apprenticeships is regulated by law. The case of the apprentice slave [illegible]. *In re* Turner, 1 Abbott's, 84, was the case of a party under the law of Maryland. Chief Justice Chase decided Turner was held in "involuntary servitude," not that an individual restrained him of his liberty, but because the restraint was legalized and enforced by a Maryland law.

Mr. Justice Miller further said in the Slaughter House cases, page 72:

"If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights *are assailed by the States*, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent."

We thus see throughout the opinion, which was the first declaration from this honorable court as to the meaning of the thirteenth amendment, and which has been quoted with approval in numerous opinions since, the idea prevails that the use of the word "servitude" in the thirteenth amendment was intended to include all possible shades or conditions of slavery that might be imposed by the States or be permitted through their agencies. There is not a suggestion that it was intended to cover cases of trespasses of liberty by the lawless act of individuals.

Mr. Justice Strong, in *Ex parte* Virginia, 100 U. S., 344, in discussing the thirteenth and fourteenth amendments used this expression:

"They were intended to take away all possibility of oppression *by law* because of race or color."

Mr. Justice Bradley, in the Civil Rights cases, 109 U. S., 21:

"In a very able and learned presentation of the cognate questions as to the extent of the rights, privileges, and immunities of citizens which cannot rightfully be abridged by State laws under the fourteenth amendment, made in a former case, a long list of burdens and disabilities of a servile character incident to feudal vassalage in France and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another, were servitudes or badges of slavery, which a great nation in its effort to establish universal liberty made haste to wipe out and destroy."

"But these were servitudes *imposed by the old law*, or by long custom, which had the force of law and exacted by one man from another without the latter's consent. Should any such *servitudes* be imposed *by a State law*, there can be no doubt that the law would be repugnant to the fourteenth amendment, no less than to the thirteenth amendment."

Here is not only the suggestion of other classes of servitudes than the servitude named in the fourteenth amendment, but the suggestion again that the servitude prohibited by the thirteenth amendment is that servitude which the States only might impose, permit, or allow.

It is worthy of significance that in the Civil Rights cases Mr. Solicitor General Phillips, who appeared for the Government, admitted in his brief (109 U. S., 7) the very proposition for which we are contending, to wit, that "involuntary servitude" as used in the thirteenth amendment does not cover "mere scattered trespasses against liberty committed by private persons."

The language used by Mr. Justice Harlan in his dissenting opinion in this case, page 36, illustrates the proposition we are submitting. In speaking of the legislation Congress might enact under the thirteenth amendment he said: "And such legislation may be of a direct and

primary character operating upon States, their officers and agents, and also upon at least *such individuals and corporations as exercise public functions and wield power and authority under the State.*" Now, if the learned justice had meant that the legislation under the thirteenth amendment could be direct and primary, acting upon *all individuals*, it would have been much simpler to have said so, and if such had been his meaning, we doubt not, that language would have been used. The language that he did use was also qualified by what preceded it. He said: "I do not contend that the thirteenth amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights, which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared, * * * was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from and protection against all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation may enact laws to protect that people against the deprivations, *because of their race*, of any civil rights granted to other freemen in the same State," and then follows the quotation first made from the opinion. Clearly, therefore, the legislation he referred to as being authorized to be direct and primary was such as would protect the Africans *because of their race*, from the deprivation of their civil rights granted to other freemen in the same State. It was the discrimination *on account of race* that he insisted should be reached by direct legislation on the individual. His opinion in this regard did not become the opinion of the court, but, as then stated, the proposition he insisted upon is an entirely different one from that now before the court. The

Government, in the case at bar, is insisting that the legislation of Congress, may be direct and primary, operating upon the act of a mere private citizen who trespasses upon the liberty of another citizen, and that such legislation may be had, *omitting all reference to race discrimination.*

In the Civil Rights cases the court held that a law proposing to punish those who denied colored citizens, because of their race, of equal accommodations at inns, public conveyances, theaters and other places of public amusement, was invalid. The law was sought to be maintained primarily as an appropriate exercise of power by Congress under the fourteenth amendment, but the law not being directed against State action, it was held not to be "appropriate" legislation under that amendment.

The court also held that refusing the accommodations, referred to in the law, to a person because he was an African, imposed upon him no badge of slavery or involuntary servitude and was not, therefore, "appropriate" legislation under the thirteenth amendment.

In the opinion, however, Mr. Justice Bradley, page 23, used this language:

"Under the thirteenth amendment, the legislation, *so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude*, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."

This expression of Mr. Justice Bradley is substantially the only authority quoted by the Government to sustain the proposition relied upon by it in the case at bar. In the language quoted, it will be noted that the learned justice was careful to restrict the legislation that he stated could be direct and primary to such legislation, only, as is "necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude."

We have already shown that both "slavery" and "involuntary servitude" are creations of the law. Hence it

follows that the lawless act of an individual who holds another to labor or service to pay a debt is not a "form" of "slavery" or "involuntary servitude." Neither can it be an "incident" of either. Personal service lawlessly exacted by one individual of another is in a class of "servitude" wholly unrelated to the servitude prohibited by the thirteenth amendment. It is neither a "form" nor an "incident" of the latter. It is wholly different therefrom, and therefore it follows that the language quoted from Mr. Justice Bradley has no bearing upon the case of an individual trespass of liberty.

The Civil Rights cases inform us that refusing to all persons equal accommodations at inns, theaters, and public conveyances imposes no form, badge, or incident of slavery upon the persons refused, but they do not inform us what would be such a "form or incident" of slavery or involuntary servitude as Congress could reach by direct legislation upon the individual. The opinion does inform us, however, on page 17, "that civil rights such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority, in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force and may presumably be vindicated by resort to the laws of the State for redress."

Now, the right of freedom from slavery or involuntary servitude, except as a punishment for crime, is a civil right, and a most valuable right that the Constitution through the thirteenth amendment guarantees, among other things, against State aggression. It is a right, as we have seen from the definitions of slavery and involuntary servitude, that

cannot be taken away except by the aggressions of a State. It cannot be impaired by the lawless act of an individual. Unless the individual who interrupts the enjoyment of the right be supported by "State authority in the shape of laws, customs, or judicial or executive proceedings" *the right is not impaired*, and no authority is given to Congress to act against the individual who thus interrupts, but does not impair the right. The aggrieved individual is left for his redress to the State courts where the power *is* vested to punish the private wrong or crime committed.

It will be noted that in the language of Mr. Justice Bradley, quoted and relied upon by the Government, the exact expression used in reference to the legislation that may be enacted under the thirteenth amendment is "may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." It is not "whether sanctioned by State legislation or not, or *whether done under State authority in the shape of customs, or judicial or executive proceedings or not.*" These latter words were omitted, and their omission is significant, for they were used in the same opinion, on page 17, as just hereinbefore quoted. The language of Mr. Justice Bradley, as relied upon by the Government, does not, therefore, open the door wide to Congress, *even in matters of slavery and involuntary servitude*, to legislate against the individual, whose acts are sanctioned by neither State legislation nor by State authority in the shape of customs, or judicial or executive proceedings. It does not contradict the authorities we have quoted to sustain the proposition that Congress cannot legislate against the naked, lawless acts of an individual.

The honorable Attorney General quoted as authority to sustain the definition of "involuntary servitude" relied upon by him the case of Clark, reported in 1st Blackford's Ind. Reports, p. 122. An examination of the case, however, shows the simple fact only that in the year 1816 a State court in Indiana released on *habeas corpus* one party who

was being held by another under a contract for personal service extending through a term of years. It appeared that the State constitution had affirmed the liberty of *all* the citizens of the State, and it further appeared that neither the common law nor the statutes in force in Indiana recognized the coercion of a specific performance of contracts. The party being held under the contract asked to be released on writ of *habeas corpus*. The party holding set up the contract for personal service in reply. The court discharged the party held, saying, page 124, in reply to the argument that the party making the contract should be held to its performance: "Such a performance, *if enforced by law*, would produce a state of servitude as degrading and demoralizing in its consequences as a state of absolute slavery." This opinion, therefore, does not decide that the lawless holding of one person by another to service or labor is a "servitude" or "slavery," but if such a holding is enforced *by law* it would become so. That is precisely our contention.

Now it so happens that the Indiana case quoted by the honorable Attorney General has been quoted with approval by the supreme court of Georgia. In a case reported in 74 Georgia Reports, 247, the court says:

"The agreement related to personal property and the application of skill and *personal* labor to do it, in order to make it conform to the uses intended by the parties. * * * Besides we are not aware of any power possessed by a court of equity, or any other court, to compel a party to perform personal service for another, which he had contracted to perform, but was unwilling to render; this would reduce him to involuntary servitude, not as a punishment for crime, but for an alleged breach of contract, and would be directly in the teeth of the Constitution (*Ex parte* Clark, 1 Blackford R., 122, which is fully in point)."

This is a ruling, not that the lawless holding by one party of another to a contract for personal service would be involuntary servitude, as contended for by the Government, but

that if a court of equity or any other court should *compel* the compliance with such a contract it would then become involuntary servitude, which is our contention.

In 63 Fed. Rep., in the case of Arthur *vs.* Oakes, Mr. Justice Harlan, sitting in the circuit court of appeals, seventh circuit, in discussing an injunction that had been issued by the circuit court against striking railroad employés (the railroad being in the hands of receivers), in which, among other things, the employés were enjoined "from so quitting the service of said receivers with or without notice as to cripple the property, or prevent or hinder the operation of said railroad," said, page 317:

"But the vital question remains whether a court of equity will under any circumstances, by injunction, prevent one individual from quitting the personal service of another. An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called, or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is placed in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to their jurisdiction."

This is in effect the same principle held in the Indiana and Georgia cases. *For the courts* to restrain an individual from quitting the personal service of another would place that individual in a condition of involuntary servitude. This comports with our contention but is very far from sustaining the contention of the Government that the *lawless act* of one individual in restraining another from leaving his personal service, or in lawlessly holding him to personal service, would constitute involuntary servitude.

These three cases, the Indiana and Georgia cases and Arthur *vs.* Oakes, illustrate, possibly, the meaning of the language of Mr. Justice Bradley in the civil rights

cases that is relied upon by the Government. Legislation might be had by Congress punishing the individuals who, under the orders of the courts, as cited in the said three cases, held the parties to involuntary servitude. The holding would not be "sanctioned by State legislation," and it would be "direct and primary, operating upon the acts of individuals." The justification for congressional legislation would grow out of the fact that the right to liberty had been impaired by State or United States authority "in the shape of judicial proceedings."

As still further illustrating our contention that involuntary servitude is something created or permitted by the State through its laws, customs or agencies, or by Government in some of its phases, we quote from the head-note in Le Grand *vs.* The United States, 12 Fed. Rep., 577, the opinion being rendered by Mr. Justice Woods, sitting in the circuit court, eastern district of Texas, and the head-note, as we understand, being prepared by him in reporting the case:

"Where a State has been guilty of no violation of the provisions of the thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States, no power is conferred on Congress to punish private individuals, who acting without any authority from the State and it may be in defiance of law, invade the rights of the citizen, which are protected by such amendments."

Finally, it must be true that the involuntary servitude meant by the thirteenth amendment means only that servitude imposed, permitted, or sanctioned by Government through some of its agencies, because the States have jurisdiction to punish trespasses on liberty by lawless individuals, and if the States have jurisdiction for this purpose the United States has not.

Fourth Proposition.

THE PROTECTION OF PERSONAL LIBERTY AGAINST THE LAWLESS ACTS OF INDIVIDUALS VESTS EXCLUSIVELY IN THE STATES, AND THE UNITED STATES HAS NO JURISDICTION THEREOVER. CONSEQUENTLY, IF THE ACT OF 1867 PROPOSES TO PUNISH ONE INDIVIDUAL FOR HIS LAWLESS ACT IN HOLDING ANOTHER TO LABOR OR SERVICE TO PAY A DEBT OR OTHERWISE, AS CONTENDED FOR BY THE GOVERNMENT, AND AS IS NECESSARY TO BE ESTABLISHED IN ORDER TO SUSTAIN THE CONTENTION OF THE GOVERNMENT IN THE CASE AT BAR, THEN THE ACT OF 1867 IS NULL AND VOID, AS BEING BEYOND THE POWER OF CONGRESS SO FAR AS CONCERNS INDIVIDUALS IN A STATE.

The honorable Attorney General broadly contends in the case at bar that, under the thirteenth amendment, Congress has the power by direct and primary legislation to punish the lawless act of an individual in a State who holds another to labor or service to pay a debt. That proposition is squarely before this honorable court for its determination. It presents a great question. It involves the respective jurisdiction of the States and the United States over human liberty. It involves the question as to whether the States, since the thirteenth amendment, have any jurisdiction over the protection of human liberty. In all probability it calls for a declaration from this honorable court as to the scope and limits of the thirteenth amendment, in a more comprehensive and specific way than has yet been stated. From our standpoint, the proposition contended for by the Government is so untenable, and is so at variance with our conceptions of the powers of the United States Government, as defined in the Constitution and amendments, and as interpreted by the many great opinions emanating from this honorable court, that we can scarcely grasp the fact that it is now being seriously urged. We are

impressed, however, with the fact that the highest officer in the Department of Justice has been here forcibly, ably, and seriously urging its maintenance, and that it is therefore incumbent upon us to make perfectly clear our reasons for insisting that the proposition advanced is utterly untenable.

The propcsition and the questions thereunder could never have arisen prior to the thirteenth amendment. This honorable court in New York *vs.* Miln, 11 Peters, 103, said:

"A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered or restrained by the Constitution of the United States."

Up to the time of the ratification of the thirteenth amendment, the power of the State and, as well, its duty to protect its citizens in their fundamental rights of life, liberty, and property was never questioned anywhere. The protection of the personal liberty of the citizen was ever recognized as the prerogative and duty of the State, and as, perhaps, the chiefest of its fundamental duties. In what manner have the thirteenth and fourteenth amendments changed the relations of the States to this important power and duty? Has the State by virtue of these amendments lost the power and duty to protect the personal liberty of those who enjoyed personal liberty prior to the adoption of the thirteenth amendment, or has there been laid upon it, by these amendments, the additional power and duty to protect the personal liberty of those who were made free by the thirteenth amendment?

Are there two kinds of personal liberty in the United States? Is there one kind inherited as an inalienable right, and another kind that was secured by war and the thirteenth amendment? Is the one kind under the protection of the State and the other under the protection of the United States? Has the new one been merged with the old one and placed

by its side under the protection of the State, or have the two been merged and both placed in the keeping and under the care of the United States Government?

IF THERE BE BUT ONE KIND OF PERSONAL LIBERTY—AND WE SUBMIT THERE IS BUT ONE—ITS PROTECTION AGAINST THE LAWLESS ACTS OF INDIVIDUALS AND AGAINST LAWLESS VIOLENCE MUST BE WITH EITHER THE STATE OR THE UNITED STATES. IT CANNOT BE WITH BOTH. THERE IS NO SUCH THING AS CONCURRENT JURISDICTION BY THE STATE AND THE UNITED STATES OVER THE SAME CRIMINAL OFFENSES.

Section 711 of the Revised Statutes reads in part as follows:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be *exclusive* of the courts of the several States:

"First. Of all crimes and offenses cognizable under the authority of the United States."

* * * * * * *

In the Cruikshank case, 92 U. S., 550, Mr. Chief Justice Waite said:

"The people of the United States, resident within any State are subject to two governments; one State and the other National; but there need be no conflict between the two. *The powers which one possesses, the other does not.* They are established for different purposes, and have separate jurisdictions. Together they make one whole and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen, that a person is amenable to both jurisdictions for one and the same *act*. Thus if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance and that of the State by the breach of peace in the assault. So too, if one passes counterfeited coin of the United

States, within a State, it may be an offense against the United States and the State; the United States because it discredits the coin; and of the State because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction."

In Gibbons *vs.* Ogden, 9th Wheaton, the same principle of no concurrent jurisdiction was held. Mr. Justice Johnson, on page 234, used this language: "It is no objection to the existence of distinct substantive powers that in their application they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship that may be the subject of commercial regulations may also be the vehicle of disease," and thus operated upon by the laws of both the United States and the State. On page 238 he said:

"He who robs the mail may also steal the horse that carries it and would unquestionably be subject to punishment at the same time under the laws of the State in which the crime is committed and under those of the United States."

To the same effect are

Fox *vs.* U. S. (5 Howard, 434).
Marigold *vs.* U. S. (9 Howard, 559).
Cross *vs.* U. S. (132 U. S., 131).

It is thus made manifest by both legislative enactment and judicial interpretation that there is no concurrent jurisdiction of the State and of the United States to punish the same criminal offense. The same act may constitute two

separate and distinct offenses; the one under the jurisdiction of the United States, the other under the jurisdiction of the State. But who can divide and create two distinct offenses out of the act of an individual in depriving another of his liberty? There is but one act and one offense. The right of personal liberty has been violated, and that right can be protected in but one jurisdiction. The simple fact that in depriving another of his liberty the party doing so may, in addition to the deprivation of liberty, exact personal labor or service to pay a debt from the party so deprived, does not cause him to commit an additional offense and one within the scope of the thirteenth amendment. The exaction of the personal labor or service, if proven, would, perhaps, in the discretion of the court, increase the severity of the sentence against the party convicted, if it was a criminal prosecution; or if the proceeding was a civil one to recover damages, it might increase the amount of damages awarded. It would not, however, create or establish any new or separate offense. The thirteenth amendment deals only with the subject of the deprivation of liberty. It is slavery and involuntary servitude alone that are dealt with. The thing that is prohibited is the taking away of liberty. The *purpose* of the taking, whether to collect a debt, or to exact personal service, or for any reason, is wholly irrelevant and outside of the scope of the amendment.

It being thus shown that there can be no concurrent jurisdiction of State and Federal courts over the protection of personal liberty against lawless violence, we submit that

THE STATE ALONE HAS SOVEREIGNTY AND JURISDICTION TO PROTECT PERSONAL LIBERTY AGAINST THE LAWLESS ACTS OF INDIVIDUALS AND AGAINST LAWLESS VIOLENCE.

The first proposition we submit, is the limited power and jurisdiction of the United States, and that no rights not granted or secured by the Constitution can be protected by act of Congress.

In the Cruikshank case, 92 U. S., 550, Mr. Justice Waite said:

"The Government thus established and defined (by the Constitution) is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are *limited in number*, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond it has no existence. It was created for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. *It can neither grant nor secure to its citizens any right or privilege, not expressly or by implication placed under its jurisdiction.*"

He said further, page 551:

"The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. *No right can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.*"

It being conceded that prior to the adoption of the thirteenth amendment the States had exclusive jurisdiction over the protection of personal liberty, it will be noticed from the decision just quoted, which decision was handed down in 1875, ten years after the thirteenth amendment was ratified, that the Government of the United States, after as well as before the thirteenth amendment, was and is a government of limited and enumerated powers, and, it must follow, that unless the right to personal liberty is a right granted or secured by the thirteenth amendment, its protection must be left to the States, and the United States has no jurisdiction over it.

Is the right of personal liberty a right granted or secured by the thirteenth amendment? Unquestionably not. The

conclusiveness of the answer is shown in the fact that the right existed for time immemorial before the thirteenth amendment was adopted, as to all except a certain class of the citizens of some of the States.

The States, for time immemorial before the thirteenth amendment was adopted, had been engaged in protecting this right, and there is no argument and no authority to sustain the proposition that the power of the State to give this protection was taken away by the thirteenth amendment.

The fifth amendment, adopted almost simultaneously with the Constitution itself, provides, among other things, that:

"Nor shall any person * * * be deprived of life, *liberty* or property without due process of law."

Here is a prohibition against the deprivation of personal liberty, put in broader terms than the prohibition is put in the thirteenth amendment. The latter amendment prohibits the deprivation of liberty by two methods only, to wit, slavery and involuntary servitude. The fifth amendment prohibits its deprivation by *any and all* methods, except "due process of law." It is true, nevertheless, that it has never been contended that the fifth amendment confers any jurisdiction, whatsoever, upon Congress to protect personal liberty. The fifth amendment, along with the other first ten amendments, has ever been held to be a prohibition merely against the United States Government (123 U. S., 166; 153 U. S., 538; 164 U. S., 158; 175 U. S., 174).

While it is true, as was stated by Mr. Justice Bradley in the Civil Rights cases, 109 U. S., 20, that the thirteenth amendment "has a reflex character, establishing and decreeing universal civil and political freedom throughout the United States," and "By its own unaided force and effect it abolished slavery and established universal freedom," meaning that upon the ratification of the thirteenth amendment those who were slaves before its ratification imme-

diately became freemen, and so became, without any action of the government of the State where they lived; it is also and none the less true that the thirteenth amendment, as Mr. Justice Bradley further said, "May be regarded as nullifying all State laws which establish or uphold slavery." In other words, it is a *prohibition* against State laws and National laws that create or establish slavery or involuntary servitude, but it is more than that, *it is a guaranty to all citizens of the right, not to personal liberty, but to freedom from "slavery or involuntary servitude." The Congress may therefore legislate directly against all "forms and incidents" of slavery and involuntary servitude, but not against all forms and incidents by individuals of lawless trespass upon personal liberty.* The individual who lawlessly interferes with the enjoyment of the right of personal liberty commits a private wrong or crime, for which the State is alone sovereign to punish. He has not taken away or impaired in the slightest degree the right to freedom from slavery or involuntary servitude secured by the thirteenth amendment, and not having done so, the Congress has no jurisdiction to punish him. It is utterly beyond the power of an individual, as an individual, and unsupported by his State government, through its laws, customs, or executive or judicial agencies, to take away or impair the right secured by the thirteenth amendment. If, however, the individual, through and by some agency or power of his State, trespasses upon the liberty of another, he does impair the right granted by the thirteenth amendment and Congress may punish him.

If such individual lawlessly attempts to take away or impair such right, the person thus sought to be deprived will be protected by the State courts, and if they fail to give such protection their error can be corrected upon appeal or writ of error to this honorable court, because the decision of the State courts, in effect affirming the restraint of liberty, would be a deprivation of liberty by State authority. And this same remedy, through the final adjudication of this honor-

able court, exists for the protection of any one where the State courts fail to protect him in the enjoyment of any right secured under the Constitution of the United States.

This power in the courts to protect a citizen in the enjoyment of a right constitutionally guaranteed to him may not always be accompanied with the power to punish the party who attempts to deprive him of such a right. The power to punish can exist only by virtue of a constitutionally enacted statute; the power to relieve from unauthorized oppression may exist by virtue of the Constitution and independently of statutes. *In re* Turner, 1 Abbott, 84, Mr. Chief Justice Chase liberated Turner, who was held under a contract sanctioned by law, but he had no power to punish the party holding him. The right of the party to be liberated existed under the thirteenth amendment. His restraint of liberty was involuntary servitude, because maintained by law. Under the power of the thirteenth amendment, without the intervention of any statute, the court released him. And so the courts may protect every citizen in every right guaranteed to him by the Constitution.

WE THUS SEE THAT THE THIRTEENTH AMENDMENT CONFERS UPON CONGRESS JURISDICTION ONLY TO ENFORCE THE PROHIBITION AGAINST SLAVERY AND INVOLUNTARY SERVITUDE. IT DOES NOT GRANT THE RIGHT TO PERSONAL LIBERTY, WHICH HAD PREVIOUSLY EXISTED, NOR DOES IT GIVE CONGRESS JURISDICTION TO PUNISH THE LAWLESS ACTS OF INDIVIDUALS AGAINST PERSONAL LIBERTY.

That the thirteenth amendment was never intended to and does not take away the power and duty of the State to protect its citizens in their personal liberty, as against the lawless acts of individuals and lawless violence, is made perfectly manifest by reference to the fourteenth amendment, which was ratified, of course, after the thirteenth amendment went into effect.

The fourteenth amendment in the first clause thereof contains this language:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

Now, if it is true that the thirteenth amendment had already transferred from the State to the United States jurisdiction for the protection of personal liberty against lawless violence, this part of the fourteenth amendment quoted would be meaningless. If the State had no power or jurisdiction over personal liberty remaining after the thirteenth amendment, it could not deprive a person of personal liberty.

The fourteenth amendment, therefore, is a complete constitutional recognition of the *fact*, that power and jurisdiction of the State over some phases or forms of personal liberty still existed in the State subsequent to the thirteenth amendment. That the power remaining in the State is the power to protect its citizens against lawless violence, we submit there can be no question, and that this power thus remaining in the State is exclusively in the State and entirely beyond the power of the United States, we submit, is equally beyond dispute.

If we take the language quoted from the fourteenth amendment, "Nor shall any State deprive any person of life, liberty or property without due process of law," and strike therefrom the words "life" and "property," can any one doubt that a law enacted in the language of the sentence, as it would read with these two words stricken, would be "appropriate" legislation under the thirteenth amendment? Suppose this had been done, would it not be true that every decision of this honorable court, construing such a law, would have direct reference to the powers of Congress under the thirteenth amendment? Now, the framers of the fourteenth amendment thought it better not to rely upon a mere statute, but to add another constitutional amendment,

and they did by this amendment, so far as "liberty" is concerned, what could have been done by statute, the difference being that the amendment is more difficult to repeal than would have been the statute. It being universally conceded, so far as we understand the matter, that the fourteenth amendment was designed in part to make the thirteenth amendment more effective, it necessarily follows, it seems to us, that all of the opinions of this honorable court on the fourteenth amendment, wherein the subject of "liberty" is under discussion, must have been delivered with direct reference to the powers of Congress under the thirteenth amendment, and therefore that they are each and every one now apt and proper to be considered in determining the scope and power of Congress under the thirteenth amendment.

That the right to personal liberty is not granted by the thirteenth amendment, or by any other part of the Constitution, but is a right "inherent" in the people and to be protected against lawless violence by the State, is, we think, conclusively established by the following language used by Mr. Chief Justice Waite in the Cruikshank case in 92 U. S., page 553:

"The rights of life and personal liberty are the natural rights of man. 'To secure these rights' says the Declaration of Independence 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest *duty* of the *States*, when they entered into the Union, under the Constitution, was to *protect* all persons within their boundaries in the enjoyment of these 'unalienable *rights* with which they were endowed by their Creator.' *Sovereignty for this purpose rests alone with the States.* It is *no* more the duty or within the power of the *United States* to *punish* for a conspiracy to falsely *imprison* or murder within a State, than it would be to punish for false imprisonment or murder itself."

This authority not only settles finally and conclusively that the right to personal liberty is not a right granted by the

Constitution, but is one of the "natural rights of man" and is an "unalienable right" with which men were "endowed by their Creator." It not being a right granted, it is neither a right "secured or guaranteed" by the Constitution, except in a limited degree. It is guaranteed against "slavery and involuntary servitude," but not guaranteed against the lawless acts of individuals. "Sovereignty" for its protection against the lawless acts of individuals "rests alone with the States."

The contentions of the Government, therefore, in the case at bar, are completely disposed of by this authority, but more than that, the case at bar is completely disposed of also. To hold another to service or labor to pay a debt and to do so lawlessly is no more than false imprisonment, if it be not that specific thing; and this authority *specifically holds* that the United States has no duty or power to punish that kind of an act.

Prior to the thirteenth amendment no one questions that the United States had no jurisdiction over the act of one individual in lawlessly trespassing upon the life, liberty, or property of another individual. We are presented, therefore, with the question as to whether the thirteenth amendment, or any other amendment, has added to the rights of one individual as against another, so as to confer jurisdiction upon the United States to remedy the wrong of one individual against another.

Bearing in mind that the fourteenth amendment deals with liberty, as does the thirteenth, and that this honorable court ever had before it, in construing the former, the powers of Congress under the latter, the following language used by Mr. Chief Justice Waite in 92 U. S., 554, is proper to be quoted in this connection:

"The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the

fundamental rights which belong to every citizen as a member of society."

Also the following language at bottom of same page, 554:

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but the provision does not, any more than the one which precedes it and which we have just considered, add anything to the *rights which one citizen has under the Constitution against another.* The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there."

Also the following from Mr. Justice Lamar, while sitting in the circuit court in the case of United States *vs.* Sanges reported in 48 Fed. Rep., 78, 83, and 84. Citing the Slaughter House cases, Cruikshank, Reese, Harris, Strauder, *Ex parte* Virginia, the Civil Rights cases and others, he said:

"In these decisions of the Supreme Court, it has been found necessary to pass upon the construction of these (secs. 5508 and 5509) and many other sections of the Revised Statutes in their application to the varying facts presented by each case. But they all show the steady adherence of that court to the fundamental principles enunciated by Mr. Justice Bradley in the case of The United States *vs.* Cruikshank, 1 Woods, 308, and reiterated by the Supreme Court of the United States in the same case on writ of error. They all agree that aside from the extinction of slavery and the declaration of national citizenship, the constitutional amendments are restrictive upon the power of the General Government and the action of the States, and that there is nothing in their language or spirit which indicates that they are to be enforced by congressional enactments authorizing the trial, conviction and punishment of *individuals for individual invasions of individual rights,* unless committed under State authority."

Mr. Justice Lamar further said, pages 84 and 85:

"The sections in the enforcement act on which the indictment in the Cruikshank case was founded are, as we have stated, the same in substance as those on which the indictment in this case was founded. All the counts in the former indictment were held by Judge Bradley in the court below (1 Woods, 308) and by the Supreme Court (92 U. S., 548) to be not sufficient to sustain a conviction, because the sixth and seventh sections of the enforcement act were unauthorized by the Constitution. As the constitutional amendments relied upon in the support of those sections are clearly illustrated, and the limits within which they may be enforced by Congress are distinctly defined in the able opinion of the court in that case delivered by Chief Justice Waite, we deem it proper to quote more freely from it than usual. *The chief ground of the decision is that the clauses in the constitutional amendments relied on to sustain the validity of the enforcement act were guarantees of rights against the action of the Government only, Federal or State, and not against individuals; and that, therefore, they do not afford constitutional grounds for penal legislation against individuals.*"

In the Cruikshank case, while in circuit court, reported in 1 Woods Reports, Mr. Justice Bradley, page 316, said:

"For example when it is declared that no State shall deprive any person of life, liberty or property, without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery, or any other crime committed by individual malefactors, so as to give Congress the power to pass laws for the punishment of such crimes in the States generally. * * * *and the power of Congress, whether implied or expressed, to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of ordinary crime within the States.*"

Mr. Justice Bradley further said, page 319:

"It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him, in the exercise and enjoyment of the rights and privileges conferred by the *XIII* amend-

ment and the laws thus passed in pursuance thereof. But this *power* does not authorize Congress to pass laws for *the punishment of ordinary crimes and offenses against persons of the colored race, or any other race. That belongs to the State government alone.* All ordinary murders, robberies, assaults, thefts *and offenses whatsoever* are *cognizable only in the State courts,* unless indeed the State should deny to the class of persons referred to, the equal protection of the laws. Then of course, Congress could provide for their security and protection."

It is a fact worthy of note that this opinion just quoted from was delivered by Mr. Justice Bradley while on circuit, and that the opinion of this honorable court affirming it, reported in 92 U. S., was delivered by Mr. Chief Justice Waite, and that it has frequently been referred to with approval in other opinions of this honorable court and is, therefore, to be regarded, if one opinion of this honorable court as against another can be so regarded, as of particular force and value.

To apply this opinion to the case under consideration, it is apparent that the lawless violation of personal liberty of a citizen does not constitute a divisible offense. In its nature there is not one feature of the act which can be said to be an offense against the United States, and another feature which can be said to be an offense against the State. Being an indivisible offense, it must be either that the United States has the exclusive jurisdiction of it, or that the State has such exclusive jurisdiction, if the rule laid down in the Cruikshank case is to govern. *And the fact is not to be overlooked that the ruling was made in that case when it was decided that the United States did not have jurisdiction because the offense was against the fundamental personal rights which antedated the Constitution of the United States, and the protection of which, therefore, belonged to the State,* and that, thus belonging to the States respectively, the acts were indivisible, so as to constitute two offenses, and the jurisdiction could not at the same time belong to the United States. The court,

in laying down the rule (92 U. S., 550), differentiated acts of that character from those of the dual character as cited in the illustrations. *The fundamental principle ruled in the Cruikshank case is that rights of persons existing prior to the formation of the United States Constitution are under the protection of the States*, as stated so tersely in the seventh headnote:

"Sovereignty for the protection of rights of life and personal liberty within the respective States *rests alone with the States.*"

It would seem to be conclusive, independently of these authorities, that the thirteenth amendment could not add anything to the rights of one individual as against another, for the very simple reason, as we have seen, that neither slavery nor involuntary servitude can exist without the aid in some way of governmental authority. An individual as an individual cannot create slavery or involuntary servitude, and cannot take away the right of freedom from slavery and involuntary servitude secured by the thirteenth amendment.

That the right to personal liberty is not granted by the Constitution in any of its amendments, and that jurisdiction to punish lawless individual invasions of that right rests alone in the State, is further shown in the opinion delivered by Mr. Justice Bradley in U. S. *vs.* Cruikshank, when said case was in the circuit court, the same reported in 1 Woods, 308, 314, 316, and just hereinbefore quoted from. Mr. Justice Bradley said:

"With regard to those acknowledged rights and privileges of the citizen which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular State of which he is a citizen to protect and enforce them, and to do naught to deprive him of their full enjoyment. *When any of these rights and privileges are secured in the Constitution of the United States*

only by a declaration that the State or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the Constitution, but that the Constitution only guarantees that they shall not be impaired by the State or the United States, as the case may be. The fulfillment of this guaranty by the United States is the only duty with which that Government is charged. *The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the State government as a part of its residuary sovereignty.*"

The right to personal liberty is secured against violation by the United States in the fifth amendment, and against violation by the State in the fourteenth amendment. We are, therefore, to at once understand that it is a right not created or conferred by the Constitution, and that the affirmative enforcement of the right belongs to the State as a part of its residuary sovereignty.

To much the same effect is the summing up by Mr. Justice Gray, in Logan's case, 144 U. S., 293, where, after quoting from the cases of Reese and Cruikshank, in 92 U. S.; Strauder and *Ex parte* Virginia, in 100 U. S.; Harris, in 106; Civil Rights cases, in 109 U. S.; Yarbrough, in 110 U. S.; Waddell, in 112 U. S., and Baldwin, in 120 U. S., he says:

"The whole scope and effect of this series of decisions is, that while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgement by the United States, or by the States, as the case may be, and *cannot, therefore, be affirmatively enforced by Congress against unlawful acts of individuals;* yet that every right created by, arising under, or dependent upon the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as Congress in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

From which opinion we understand that the fundamental right of personal liberty, being a right recognized and declared, but not granted in any of the amendments, but by the fifth amendment guaranteed against violation by the United States, and by the fourteenth amendment guaranteed against violation by the State, cannot be affirmatively enforced by Congress against the unlawful acts of individuals.

The jurisdiction of the State for the protection of certain fundamental rights, recognized and declared, but not granted or created by the Constitution or its amendments, naturally embraces the jurisdiction to protect personal liberty, and that jurisdiction cannot be destroyed by the fact that the personal liberty of the African was conferred by the authority of the United States, for the white man enjoyed the right of personal liberty before the first African was brought to America and jurisdiction to protect it rested in the State from its foundation.

In the light of these several decisions, we are in a better position to appreciate the force of the following deliverance of this honorable court.

In discussing the fourteenth amendment in the Civil Rights cases, 109 U. S., p. 13, Mr. Justice Bradley said:

"Of course legislation may and should be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the places of the State legislatures and to supersede them. *It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights that men have)*

are, by the amendment, sought to be protected against invasions on the part of the State, without due process of law, Congress may therefore provide due process of law for their vindication in every case."

Now, if it had been true that the thirteenth amendment had clothed Congress with power to protect personal liberty against the lawless acts of individuals, it would *not* be absurd to affirm that Congress might and should provide for its vindication, nor would it be improper to say that Congress should establish laws regulative of the private rights to liberty as between man and man. The thirteenth amendment was before this honorable court at the time this opinion was handed down, and the opinion is, therefore, conclusive that the thirteenth amendment had not clothed Congress with the power to regulate the right to liberty as between man and man.

The same learned justice, in the same opinion, in speaking of the act relating to inns, theaters, public conveyances, etc., then under consideration, further said (page 14):

"In other words it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of these rules, without referring in any manner to any supposed action of the State or its authorities. If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. *Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property?*"

"If it is supposable that the States may deprive persons of life, liberty and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law *for the protection of every one of these fundamental rights in every possible case*, as well as to prescribe equal privileges in inns, public conveyances and theaters?"

If the right of personal liberty in all its phases had been placed under the protection of Congress by the thirteenth amendment before the fourteenth was enacted, there would have been no reason for this honorable court to have inquired why Congress should not enact a code of laws for its enforcement in all cases. The opinion quoted from utterly repudiates the claim that Congress under any amendment has jurisdiction to enforce the fundamental right of personal liberty in every case, and yet in the case at bar the Government insists not only that Congress has the power to punish one individual who lawlessly compels another individual to labor and service for him to pay a debt, but that Congress has actually passed such a law, and that such is the meaning and intent of the act of 1867, now in controversy. We submit on the authority of all the decisions quoted that if such be the meaning of the act of 1867, the act is null and void, because it is beyond the power of Congress, for that sort of violation of liberty is exclusively under the jurisdiction of the State to punish. If the State has no jurisdiction to protect liberty assailed in this way, it can have no jurisdiction for the protection of liberty in any case.

As further maintaining our contention that the State alone is sovereign to enforce the right of personal liberty, Mr. Chief Justice Fuller in Kemler's case, 136 U. S., 448 and 449, in speaking of the fourteenth amendment, said :

"Protection to life, liberty and property rests primarily with the States * * * but it (the fourteenth amendment) *was never designed to interfere with the power of the State to protect the lives, liberty and property of its citizens.*"

To the same effect is his opinion in the Converse case, 137 U. S., 632.

It was not supposed, when men's passions were strong as the result of war and of the incidents growing therefrom, that the war or the amendments had merged the State and

National governments into one, and that the State government existed no more, except as a matter of form. Can it be possible that this supposition was erroneous and that the State by these things was shorn of the chiefest of all its duties and the greatest of all its powers, to wit, the protection of its own citizens in the fundamental right to liberty? If the State no more has the power to protect one citizen in his right to liberty as against another citizen who lawlessly assails it, its glory has departed and its sovereignty has become a thing of the past. That such sovereignty was not removed, in the conception of this honorable court, in the Slaughter House case, we quote from that opinion, 16 Wallace, 82:

"But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the right of person and property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations upon the States and to confer additional power on that of the nation."

"But whatever fluctuations may have been seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject, so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

We therefore conclude, upon the reasoning and authorities cited, that the State alone has jurisdiction to protect per-

sonal liberty against the unlawful acts of individuals and against lawless violence. We next proceed to

The Transcript of Record.

During the oral argument of the case this record, upon the petition of the plaintiff in error, previously submitted, was ordered filed as a part of the case before the court, and, as we understand the situation, this honorable court may now proceed, under the act of 1891, to "decide the whole matter in controversy in the same manner as if it had been brought here (there) for review by writ of error or appeal."

It is important, therefore, to determine by the record what was the matter in controversy before the honorable circuit court of appeals. An examination of the Transcript of Record will show that Clyatt's entire case went to the honorable circuit court of appeals; that his bill of exceptions embraces a motion for new trial, a motion in arrest of judgment, and the entire evidence, all properly certified.

Commencing on page 11 of the Transcript of Record and ending on page 21, it is shown that plaintiff's bill of exceptions incorporates therein the motion in arrest of judgment, the motion for new trial, and the entire evidence, and that on page 21 is the certificate of the clerk of the court where the conviction was had, that the foregoing pages "contain a true and complete transcript of the *record* and *proceedings* had in the circuit court of the United States for the northern district of Florida in the case of The United States against Samuel M. Clyatt, and wherein Samuel M. Clyatt is plaintiff in error and The United States is defendant in error, *as the same remains of record and on file* in said court." It will also be noted on page 26 of the Transcript of Record, at the bottom thereof and following the three questions certified for instructions, this statement appears:

"For further certainty and information, a printed copy of the transcript is transmitted with this certificate."

Attention is also directed to the certificate of the clerk of the circuit court of appeals, fifth circuit, on page 27 of the Transcript of the Record, that the same is a "true copy of the record and all proceedings had."

It thus appears that Clyatt's entire case, as shown by the evidence and in the motion for new trial, and in the motion in arrest of judgment, was before the circuit court of appeals. If it be true, therefore, that this honorable court may consider and "decide the whole matter in controversy" that was pending before the honorable circuit court of appeals, it may consider and decide Clyatt's entire case, for all of it was pending in the latter court and all of it is now before this honorable court. The whole case being here, we beg to direct attention to the second ground of the motion in arrest of judgment (page 18 of the Transcript of Record):

"That there was *no proof whatever* of any peonage previous to or subsequent to the finding of the indictment on Mose Ridley or Will Gordon inflicted or caused to be inflicted by this defendant supporting the offense of peonage as charged in the indictment."

And also to the fourth ground of said motion (same page 18):

"No system of peonage is charged or proven to have been in existence within this jurisdiction."

We next ask attention to the following grounds in the motion for new trial (page 18 of the Transcript of Record):

3. "That the verdict was *without evidence* to support the same."

5. "That there was *no proof* that the named Will Gordon and Mose Ridley, prior to the time alleged in said indictment, to wit: on the 11th day of February, 1901, had ever been held to service under the system known as peonage, or that they or either of them had, before then, or ever afterwards, been held to service under the system, by the acts or connivance of this defendant."

6. "That there is *no proof* that the above Gordon or Ridley,

or either of them, were ever by this defendant subjected to voluntary or involuntary service or labor as peons in liquidation of any debt or obligation in any manner by this defendant."

11. "That there is *no evidence whatever* that the said Will Gordon or Mose Ridley, or either of them, ever returned to service with this defendant, or upon any service with which he was connected."

We direct attention to these grounds particularly because they are not complaints as to the sufficiency of the evidence or that the verdict was against the weight of evidence, but because they allege an utter and entire *absence of any evidence* whatsoever to support the main and essential ingredients of the offense charged. We bear in mind, of course, that the other grounds of both motions are here for such consideration as this honorable court may see proper to give them, and we are also mindful of the fact that the three questions certified for instructions are in no way displaced by the introduction of the Transcript of the Record. We submit, however, that the questions raised in these several grounds of the two motions are purely questions of law, and that absolutely everything necessary to their determination is in the Transcript of the Record now before the court.

That a ground in a motion for new trial, or in arrest of judgment, *of an entire absence of evidence on a material point* raises purely a question of law, is shown in 121 U. S., 567.

The opinion in this case quotes approvingly from 2 Mackey, 315, as follows:

"* * * but we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers, that evidence offered to a jury in a case has a twofold significance, *i. e.* a sufficiency in law and a sufficiency in fact; *that of its sufficiency in law, the court is the exclusive judge;* its sufficiency in fact is a question exclusively for the jury. The court in considering the legal sufficiency of the evidence to sustain the case of a suitor, or to establish any particular fact essential to his recovery, *must examine the proof* with respect to its quality and quantity, and this determination

by the court is a *question of law* * * *" To the same effect is * * * 40 N. Y. Superior Ct. (8 Jones & Spencer) 181 * * * "*If there is no conflict in the evidence, its sufficiency is no longer a question of fact, but becomes a question of law to be determined by the court.* It is to this legal sufficiency that the statute refers when it authorizes the appeal to this court."

We, therefore, submit that if it appears that there is absolutely no conflict of evidence as to any one of the essential ingredients of the offense of peonage in the case at bar, and if it appears that there is an entire absence of any evidence, legal or otherwise, upon which a legal conviction could be based, that a question of law on both the motion for new trial and the motion in arrest of judgment is presented here.

As to the Indictment.

We assume that there can be no question but that the indictment in this case is before this honorable court for a determination as to its sufficiency. The third question certified relates to it. That question is:

"Do the acts and conduct of the defendant, as charged in the indictment, constitute the offense of returning to a condition of peonage, within the purview of section 5526 of the Revised Statutes."

A somewhat similar question was certified in 112 U. S., 76, as follows:

"Whether the information in said cause charged any offense under said section 5508 of the Revised Statutes of the United States, or against any statute of the United States."

This latter question was more general in its terms than the question now propounded, and yet this honorable court answered it. We, therefore, conclude that the question now being propounded can very properly be answered. The third

question propounded, as set out above, was accompanied by a copy of the indictment set out in the certificate. The indictment has again been brought before the court in the Transcript of Record. It would, therefore, seem that if it was not admissible originally to be considered on the certificate, it has since become so by the admission of the record. The indictment is quite short and can be easily read. The first count charges the plaintiff in error as follows:

"* * * did then and there unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and Mose Ridley, returning them, the said Will Gordon and the said Mose Ridley to work to and for Samuel M. Clyatt, D. T. Clyatt and H. H. Tift, copartners doing business under the firm name and style of Clyatt and Tift, to work out a debt claimed to be due to them, the said Clyatt and Tift by the said Will Gordon and Mose Ridley * * *"

The charging part of the second count is that the said Samuel M. Clayatt "did * * * unlawfully and knowingly cause and aid to be returned Will Gordon and Mose Ridley to a condition of peonage" in the exact manner and form as expressed in the first count.

Our objections as to the sufficiency of this indictment are largely and in the main embraced in our argument as to the true meaning of the act of 1867. We have set out at considerable length our contentions in this regard. We insist, assuming for all the purposes of this argument that the act of 1867 is a valid law in all respects, that in order to convict thereunder there must be alleged in the indictment—

1st. The existence of a system of peonage established, maintained, or enforced by the State through some act, law, resolution, order, regulation, or usage.

2d. That the party charged with returning others to a condition of peonage did so under permission, authority, or color of such act, law, custom, etc., creating the system.

3d. That the parties alleged to have been returned to this condition of peonage had previously been held under it and held to a condition of labor by virtue of a contract or otherwise.

4th. That the debt existing as the basis of the peonage is due and owing and not merely "claimed to be due."

5th. That the parties alleged to be returned to said condition of peonage were returned to some particular place designated by State, county, or town wherein the alleged system of peonage existed, so as to present an allegation upon which an issue of fact can be made.

6th. That said parties were actually returned to a condition of labor existing by virtue of a "system" of peonage established and authorized.

For the sake of this branch of the argument, we submit that if it should be conceded that the United States has the authority under the act of 1867 to punish in a State a lawless act of peonage, one without the authority of a State, or its agencies, still there are no sufficient allegations in this indictment to constitute such a lawless act of peonage. But we go further:

The indictment charges merely the unlawful act of one individual in depriving another individual of his liberty. Such an act constitutes no offense against the United States. The maintenance of the right of personal liberty against the lawless acts of individuals is not under the protection of Congress. The indictment, therefore, states no offense that under the Constitution could be cognizable under the laws

of the United States. We insist that it states no offense cognizable under the act of 1867, for that act by its very terms is directed against the action of States. It makes void the "law, act, regulation, order, resolution or usage" of the State "by virtue of which" there is "established, maintained, or enforced" the holding of one person by another to labor or service to pay a debt. The penal provisions of the act must, therefore, of necessity, so far as individuals in the States are concerned, be understood as being directed against those who "by virtue of," or by authority of, or under color of the "law, act, usage, etc." of the State hold others to labor or service to pay a debt. This authority of the State must be alleged in order to charge a violation of the act, for an individual in a State could *violate it* in no other way.

As was stated by this honorable court in the Harris case, 106 U. S., 643: "A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which the private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault or murder. If, therefore, we hold that section 5519 is warranted by the thirteenth amendment we should by virtue of that amendment accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is involved. Thus under a provision of the Constitution which simply abolished slavery and involuntary servitude we should, with few exceptions, invest Congress with power over the whole catalogue of crimes," which this honorable court in that opinion held could not be done.

Also in *Ex parte* Virginia, 100 U. S., 347, it was said: "Whoever by virtue of public position under a State government, deprives another of property, life or *liberty*, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition."

Thus it is declared that it is the man who, by virtue of public position under a State government, deprives another of liberty without due process of law, who violates the constitutional inhibition against deprivation of liberty, and, necessarily, it is not the lawless individual who does so.

All acts of Congress must be construed in the light of the power granted to Congress by the Constitution, and the Constitution not having granted to Congress power to protect personal liberty against the lawless acts of individuals, it is not to be presumed that Congress undertook to do so by the act of 1867.

It must be presumed that Congress was undertaking to execute a power that it possessed, and that power was to prohibit slavery and involuntary servitude, neither of which, as we have seen, could exist except through some authority or agency of the State. If we thus construe the act of 1867 we must conclude that the penal provisions thereof were aimed at those individuals only who acted under the authority of the State in holding another to service or labor to pay a debt, and this being the meaning of the act, the indictment was fatally defective, in not alleging the use of the authority of the State by Clyatt, in the act he is alleged to have committed.

In this connection we suggest here what should have been suggested earlier in the brief, and that is, that it is patent from the reading of the act of 1867 that it was not aimed at "slavery" or "involuntary servitude," for those terms do not appear in the act. It was clearly aimed at violations of personal liberty, which Congress assumed at the time had been placed under its keeping by the thirteenth amendment, but which, as matter of fact and law, the thirteenth amendment had not done. It was not until the fourteenth amendment, which was ratified after the act of 1867 had been enacted, that Congress was given any jurisdiction over personal liberty, and then its jurisdiction was limited to corrective legislation against State action. The act of 1867 is more

properly the exercise by Congress of the power conferred by the fourteenth amendment than it is of the power conferred by the thirteenth amendment. Not being enacted, however, by authority of the fourteenth amendment, and containing matters without the power conferred by the thirteenth amendment, it is an invalid law under James *vs.* Bowman, 190 U. S., 127.

It is interesting further to note in this connection the first act passed by Congress to carry the thirteenth amendment into effect. It was the act of 1866 known as the "Civil Rights bill." It provided "that all persons * * * shall have the same right, in every State and Territory, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

SEC. 2. "That any person who under color of any law, statute, ordinance, regulation or custom, shall subject or cause to be subjected any inhabitant of any State or Territory to the deprivation of any right secured and protected by this act, etc., shall be punished, etc."

In considering this act, two very important facts are to be observed:

1st. That it being enacted under the thirteenth amendment and being the first law that was enacted thereunder, it bears the first congressional interpretation of that amendment, which is, that the powers given to Congress thereunder are powers against State action, and that only those individuals who act under the authority of the State are punishable by Congress under the amendment.

2d. We learn that, subsequent to the passage of this act, Congress determined that the act embraced matters and things not within its power under the thirteenth amendment, but which matters and things did later, after the ratification of the fourteenth amendment, come within such power, so that this act was re-enacted in 1870 under the power conferred by the fourteenth amendment.

Now, it must be unquestionably true that in 1867, the fourteenth amendment still not having been ratified, Congress had the same conception of its power under the thirteenth amendment that it had in 1866, and that it intended the act of 1867, so far as individuals in the States are concerned, to be directed only against those individuals who acted under color of law or custom of the State in doing the things prohibited, and we submit that the act so reads.

We are further fully persuaded that Congress exceeded its power under the thirteenth amendment in legislating against violations of personal liberty by individuals, even under color or authority of State law or custom, because at that time, the fourteenth amendment not being enacted, Congress had no jurisdiction to correct the legislation of the States in that regard in any way whatsoever, for until the fourteenth amendment Congress had no jurisdiction over personal liberty, except for the sole and only purpose of abolishing and preventing slavery or involuntary servitude. We are persuaded, under the numerous interpretations of the power of Congress under the thirteenth and fourteenth amendments made by this honorable court, that if Congress had had occasion to again deal with peonage as it did with civil rights, after the fourteenth amendment it would have re-enacted the act of 1867 under the power conferred by the fourteenth amendment, in the same way that under this new power it re-enacted the act of 1866.

But returning to the indictment, the general rule as to the

sufficiency of an indictment is laid down in the Pettibone case, 148 U. S., 197. On page 202 the court said:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated and that if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially by way of recital."

Also Mr. Chief Justice Waite, in the Cruikshank case, 92 U. S., 558, said:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars' (1 Arch. Cr. Pr. and Pl. 291). The object of the indictment is first to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, *not conclusions of law alone*. A crime is made up of acts *and intent;* and these must be set forth in the indictment with reasonable particularity of *time, place* and circumstances."

Applying these rules to the indictment against Clyatt, we find the indictment predicated upon section 5526, R. S., which prohibits merely the "return" of another to "a condition of peonage;" this latter expression is a generic term, and the pleader was required, to state the species, "to descend to particulars." The species or particulars of a "return to a condition of peonage" are stated in section 1990, R. S., and show the basis of the condition—the absolute essential to the existence of the condition at all—to be a

"law, act or usage, etc.," of the State authorizing the condition.

It cannot be said that all this is embraced in the words "to a condition of peonage" as found in the indictment, because, in the first place, these words do not "descend into particulars," and in the next place they are merely a "conclusion of law" by the pleader; they simply state the *name* of the offense charged, and do not *describe* the offense.

There was no offense known as "peonage" prior to the act of 1867, such as was true of murder, burglary, or larceny. The conclusion seems to be unavoidable that in constituting peonage an offense the legislative intent must be limited to the particular system of peonage mentioned in the act, and that was a system existing in New Mexico—a system existing under the law, as set out in statutes of the Territory which, upon the argument, were read to the court by the Attorney General and a portion of which statutes are hereinbefore set out in this brief.

In the case of Britton, 108 U. S., 206, it is said:

"The indictment having charged a conspiracy between the defendants to misapply the monies of the association, proceeds to aver by what means the misapplication was to be effected, namely, by procuring to be declared a dividend by the association, when there were no net profits to pay it. "*If procuring the declaration of such dividend by the association, is not a wilful misapplication of the funds by this defendant, then the indictment charges no offense.* The declaration of a dividend by the association, when there were no net profits to pay it, is, in our judgment, not a criminal misapplication of the funds."

Now, the indictment at bar charges Clyatt with having returned certain parties to a "condition of peonage." This, if true, is a charge of the violation of the act of 1867. When the indictment undertakes to say, however, how this "return to a condition of peonage" was effected, it does not state any offense cognizable under the act of 1867 or

under the thirteenth amendment. It describes merely the lawless act of one individual in depriving another of his liberty—an offense never contemplated by the act of 1867 as possible to be committed under said act by any citizen in a State, and an offense over which the Congress has absolutely no jurisdiction.

We, therefore, conclude that the indictment is fatally defective upon the grounds stated.

The indictment is also defective upon the authority of the Cruikshank case, because it fails to allege the *place* to which or where Clyatt "returned" the parties named to a "condition of peonage." The failure to name the place leaves the indictment in such shape as Clyatt not only could not make any issue of fact thereon, but could not "avail himself of his conviction" under it "against a further prosecution for the same cause." The indictment does not name the *place*, but the evidence shows that he returned the parties named to Berrien county, in the State of Georgia. Is his conviction in the State of Florida under this indictment a bar to a prosecution in Georgia for this same identical offense? Other authorities as to the sufficiency of the indictment are Bishop's New Cr. Pro., secs. 77, 80, 81, 323, 325, 507, 518, 519.

The Evidence.

When we come to consider the evidence our objections go far beyond any question as to the meaning of the act of 1867 or as to the validity of said act. We, of course, insist that the evidence utterly fails to show any facts necessary to sustain a conviction under our theory of the true intent and construction of the act of 1867, and by our objections to the evidence, as also by our objections to the indictment, we raise in but another way all the questions of law hereinbefore raised as to the meaning and validity of said act. But we now go further and most earnestly insist to this honorable court

that assuming the construction of the act of 1867, as insisted upon by the Government, to be correct, and assuming that said act, as so construed, is a valid law; assuming, in other words, that said act provides a punishment for one individual who lawlessly and as a mere individual holds another individual to labor or service to pay a debt, and that such a law is a valid exercise of power by Congress under the thirteenth amendment; that even under all these assumptions there is *absolutely no evidence* to authorize the verdict of guilty that was had. The question thus submitted, we insist, is purely a question of law, and a question that is raised by both the motion in arrest of judgment and the motion for new trial, both of which motions are now before this honorable court, together with all the evidence in the case, just as if they had been brought here by writ of error or appeal. We, therefore, earnestly ask a consideration of the evidence by this honorable court for the purpose of disposing of the question of law we raise as to the *absolute want of evidence* to support the verdict.

In this connection we may be permitted to say that it would seem to be the very irony of fate if, in the name of the great Charter of Universal Human Liberty, this man, upon the evidence here presented, should be deprived of his liberty.

The indictment, it will be noticed, does not charge any "arresting" or "holding" to a "condition of peonage." It charges only that Clyatt did "return" the parties named to "a condition of peonage," and that he "returned" them to "Clyatt and Tift," a copartnership, "to work out a debt" claimed to be due by said parties to the said "Clyatt & Tift." The proof shows that Clyatt and Tift resided in Georgia, and that the parties named were arrested in Florida and went to Georgia of their own voluntary accord with Clyatt. The proof does not show that they were ever "returned" or "delivered" to Clyatt and Tift, or that they were ever held to work out a debt, or to work at all for Clyatt and

Tift. The proof does not show that voluntarily or involuntarily said parties ever worked before or after their return from Florida for any moment of time for Clyatt and Tift. The proof not only does not show that said parties were ever "compelled" to work for Clyatt and Tift, but it absolutely fails to show that they ever rendered any service or labor of any kind at any time to or for Clyatt and Tift, or to or for Clyatt.

It fails to show that they rendered any service or labor voluntarily or involuntarily, for any person whomsoever, after they returned to Georgia from Florida, or for any moment of time, between the time at which they were "arrested" in Florida and the time at which they reached their destination in Georgia, to wit, the town of Tifton. There was certainly, therefore, no return to a condition of peonage in Florida, so as to give the court there jurisdiction to try the case, and section 731, R. S., cited by the honorable Attorney General, is not applicable. That section reads:

"Where any offense against the United States is begun in one judicial circuit *and completed in another*, it shall be deemed to have been committed in either and may be dealt with, inquired of, tried, determined and punished in either district in the same manner as if it had been actually and wholly committed therein."

If this section be the authority relied upon to give the court in Florida jurisdiction to try the case—and it seems to be—it is manifest that it does not sustain the jurisdiction claimed, because if it be assumed that the offense was "begun" within the jurisdiction of the Florida court, this alone would not give that court power to try the case, for it must further appear, according to the section quoted, that the offense was *completed* in another jurisdiction. If we assume, therefore, that the offense was "begun" in Florida, the evidence utterly and entirely fails to show that it was ever *completed* in any jurisdiction. If, therefore, all that the record shows to have transpired in Georgia had been shown to

have transpired in Florida, the court in Florida would still have been without jurisdiction, because the record fails to show that the offense was ever *completed*. It fails to show that the offense charged was ever committed in Florida or elsewhere.

We haven't the privilege in this case of ascertaining from the record the jury instructions given by the trial judge, but it would appear from a reading of the evidence that the verdict of guilty must have been predicated upon a supposed *intention* on the part of Clyatt to return the parties named to a "condition of peonage." Indeed, the oral argument of the honorable Attorney General, in so far as it dealt with the evidence in the case, rested more upon allegations as to Clyatt's *intention*, as shown by the evidence, than it did upon his *acts*, as likewise shown. Now, "a crime is made up of acts and intent" (92 U. S., 558). A man cannot be convicted of the mere *intent* to commit a crime. If the evidence shows that Clyatt *intended*, when he caused the parties named in the indictment to be arrested, to return them to labor or service for Clyatt and Tift to pay a debt, the evidence wholly fails to show that he did so return them, and consequently the element of *act* was not coupled with that of *intent*, and he therefore committed no offense and was improperly convicted.

But we submit further that a fair and reasonable construction of the acts of Clyatt, as shown in the evidence, fails to disclose any *intention* upon his part to return the parties named in the indictment to labor or service for Clyatt and Tift, to pay a debt, and consequently that there is absolutely no evidence in the record upon which, under any semblance of law or justice, Clyatt's conviction can stand.

The return of one to a condition of peonage can only be accomplished or attempted when previous to the time of such return the party thus returned had been in a condition of peonage—the condition of a debtor in a state of servitude to his

creditor to work out a debt alleged to be due to his creditor. In the absence of such a pre-existing condition of peonage, it would not be possible for the offense to be committed of "returning" one to a condition of peonage. Therefore it is necessary, as we have already shown, that an indictment for such an offense should allege with particularity, sufficient for an issue to be made thereon, the pre-existence of such a condition of peonage; but if it should be held that the word "return," as used in the indictment, sufficiently implied an allegation of a pre-existing condition of peonage, the proof must be made by satisfactory evidence that such implied allegation was true and that there was in fact such a pre-existing condition of peonage. In other words, it was necessary to show, not only that there was an indebtedness by the alleged debtor to the alleged creditor, but that the former had been in a condition of servitude to the latter to work out the debt. There is the utter absence of any evidence or suggestion that there had been any such prior condition of servitude. Not only so, but there was no definite evidence of any indebtedness on the part of the alleged peons. All the witnesses who testify were introduced by the Government. The witness Dean testified that the accused (Clyatt) stated that the four parties for whom he had warrants owed him—that he accepted from him (Dean) the amounts he claimed were owing to him by two of the parties, but that he refused to accept payment for Gordon and Ridley, as "*he wanted to carry them back to Georgia and make an example of them.*" (See Transcript, page 12.) The officer who served the warrants testified that the "warrants for Gordon and Ridley were for stealing," and further, that the accused (Clyatt) said "that they did not owe him anything and that he wanted them for stealing." (*See Transcript, page* 14.) The testimony of these two witnesses can be reconciled on the basis that it was a debt for stolen goods. But whatever the character of the debt, there was not the slightest suggestion that the parties had been occupied in working for the accused or others in

discharge of debt, and had escaped from or abandoned that condition of servitude.

Nor is there the least evidence of any *intention* on the part of the accused or of any one else to arrest the parties for the purpose of having them work out a debt, or for the purpose of having them do any work of any kind whatsoever for any person on any account; on the contrary, the testimony of witnesses offered by the Government shows the purpose of the arrest to have been for an altogether different purpose.

The witness Dean testified that the accused Clyatt accepted from him the amounts which he claimed were due by two of the parties, and he (the accused) released them. At the same time Dean offered to pay to the accused the amounts he claimed against Gordon and Ridley, and he refused to accept it, saying "he wanted to take them to Georgia and make an example of them." There was not only no expression of intention to take them back to work out the debt, but, if such was his concealed purpose, why should he wish to take them back to work out the debt when Dean offered to pay the amount in cash? And if it be suggested that he preferred their work to money, why should he have accepted the money for the other two?

So that the case shown by the record is one of the indictment and conviction of a party for the offense of returning another to a condition of peonage, or causing or aiding to be returned one to a condition of peonage, in the utter absence of the proof that the parties had previously been employed voluntarily, or had been held involuntarily to service or labor, or to a condition of servitude to anybody, or had ever done any work voluntarily or involuntarily for anybody, or that after their arrest they were ever put to any labor or service for anybody, either voluntarily or involuntarily, and, further, in the utter absence of any proof that it was the *intention* of either the accused or any one else to put the parties in a condition of servitude to anybody, or to require them to work for the accused or for anybody, on account of any

debt, or on any other account whatsoever. These are radical and broad statements, but their entire accuracy can be easily verified by an inspection of the transcript of the very brief record. And so it is, that the conviction has been had, in the absence of the least proof, of those things which are necessary for the perpetration of the alleged crime, under the theory of the Government as to what would constitute the crime.

Not only is there no proof, or an attempt at proof, of a condition of servitude or of service or of employment or of work of any kind by the alleged peons prior to the time of their arrest, nor of any such servitude, or of service, or of employment, or of work of any kind after their arrest, but the attempt of the Government to make proof of a custom, and thus by implication furnish proof of the purpose in this particular case, showed by the testimony thus offered that, so far as the general custom would indicate, the purpose was an entirely different one. The sheriff of Levy county, Florida, to whom these warrants were delivered, testified (Transcript, p. 13): "It was the usual custom to take these papers and get a settlement." This means that when the parties were indebted the custom was, by criminal warrants thus issued and served, to enforce a settlement by the debtors. Conceding this to be an illegal use of the criminal process of the court, it does not constitute the crime of peonage, or of any crime of which the United States courts can take jurisdiction. And so far as the custom is referred to, there is not the slightest reference to the use, under this custom, of any warrant, or of any arrest, for the purpose of returning or subjecting the parties arrested to servitude, or service or labor of any kind. And in this particular case the accused cannot be adjudged to have had the purpose in view of getting his money from the alleged peons, *because he refused to receive it when offered to him by Dean.* Nor can he be accused to have as his purpose the taking of the alleged peons back with him to Georgia to put them at work, because the *undisputed*

testimony of the arresting officer is that under the warrants he was taking the alleged peons to the Florida jail, there to await the disposal of the court, and that they were not taken to jail in Florida solely and only because the parties thus held by him asked to be allowed to return to Georgia with the accused rather than await in the Florida jail the action of the court (page 14 of the Record). When taken from Florida to Georgia under a requisition from the governor of Georgia, as they would have been under the testimony of the sheriff (page 13 of the Record), they would have been in the custody of an officer of Georgia and not in the custody of the accused, or of any one under his direction or control. The uncontradicted testimony of this Government's witness is that the alleged peons were arrested by him under a criminal warrant which he thought was good; that he was taking them to jail to await the disposal of the court, and that he would certainly have lodged them in jail if the parties under arrest had not voluntarily requested to be allowed to return to Georgia with the accused rather than to be put in jail. This uncontradicted testimony of the Government's witness distinctly negatives any possible theory of a design to return them to a condition of peonage, or to place them in a condition of peonage. This sworn uncontradicted testimony cannot be arbitrarily set aside and an unsupported assumption be substituted therefor that the purpose was to return these parties to a condition of peonage.

Upon this presentation of the undisputed record we rest the contention that, upon the evidence as adduced at the trial, there can be no legal conviction of the accused under the allegations of the indictment—assuming the indictment to be good, and assuming the law upon which it was predicated to be as the Government contends it to be, and to be a valid law. If so, we submit that a cause is presented calling upon this honorable court to consider the entire record and to deal with the case in its entirety, and to the end that justice may be done.

The Florida Law in Protection of Liberty.

In our original brief we quoted *in extenso* from the constitution, laws, and supreme court decisions of the State of Georgia to show that in that State no man can be legally held to the specific performance of a contract for personal service, and that human liberty is safeguarded and protected in every possible way against State and individual action. As illustrating now the further contention that human liberty is likewise safely guarded and protected by the constitution and laws of the State of Florida, and that the acts Clyatt is alleged, in the indictment against him, to have committed were acts not sanctioned by, but in direct violation of the laws of that State.

In the declaration of rights in the Florida constitution section 16 reads:

"No person shall be imprisoned for debt, except in case of fraud."

Section 19 reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party has been duly convicted shall ever be allowed in this State."

Section 1184, R. S. Florida, reads:

"In no case shall a *capias ad satisfaciendum* be issued upon a judgment, nor shall the body of any defendant be subject to arrest or confinement for the payment of money, except it be for fines imposed by lawful authority."

Section 2399, R. S. Florida, reads:

"Whoever without lawful authority, forcibly or secretly confines or imprisons another person within this State against his will, or confines or inveigles, or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this State against his will, or to cause him to be sent out of this State against his will, and

whoever sells or in any manner transfers for any term the service or labor of any other person who has been unlawfully seized, taken, inveigled or kidnapped from this State to any other State, place or country, shall be punished by imprisonment in the State prison not exceeding ten years."

Generally.

The honorable Attorney General cites in his brief section 5525 of the Revised Statutes (page 58 brief for the United States), presumably as an indirect authority for the passage of the act of 1867, but this honorable court, in 182 U. S., 499, said:

"Federal statutes * * * cannot be said to have an established meaning * * * until they are construed by the Supreme Court of the United States."

Section 5525, so far as we are advised, has never been so construed, and no opinion of this honorable court construing same is cited. It follows, therefore, that said section is not an authority directly or indirectly for any purpose in the case at bar, for its meaning has not been established.

The honorable Attorney General in his brief now of file, on pages 2 and 3, in calling attention to the importance of the case at bar, uses this language:

"It would certainly be difficult to exaggerate the importance of this case in its immediate bearings upon pending and prospective prosecutions for violation of the statute *in several of the Southern States:* * * * Immediately upon the certification of this case to the Supreme Court, as stated in the Government's motion to advance, several of the district judges in the fifth circuit, in which numerous prosecutions for violations of this statute were pending, refused to try any of the cases, and postponed the same to await the decision of the court in this case. It is, therefore, quite evident that the executive arm of the law, so far at least as the enforcement of this statute is concerned, is practically paralyzed. Notwithstanding the fact that several United States

courts have held this law to be constitutional, the Government is powerless to compel its enforcement or observance, even in the most typical and flagrant cases. It is useless to arrest offenders upon commissioners' warrants, in view of the fact that the *witnesses, by reason of their poverty-stricken condition, or low order of intelligence, may be easily tampered with*, or which very frequently happens, may be induced to leave the country. We think that we may truthfully say that upon the decision of this case hangs the liberty of thousands of persons, *mostly colored*, it is true, who are now being held in a condition of involuntary servitude, in many cases worse than slavery itself, *by the unlawful acts of individuals* not only in violation of the thirteenth amendment to the Constitution, but in violation of the law which we have here under consideration." (The italics are ours).

We do not know that we are called upon to reply to this particular language, but we would suggest that the statement therein that thousands of persons are being held in a condition worse than slavery "*by the unlawful acts of individuals*," and that it is for the relief of the parties so alleged to be held in this way that the conviction of Clyatt is urged to be sanctioned and the validity of the act of 1867 upheld, gives away the Government's entire contentions, for if there is any one thing that we believe our brief here submitted demonstrates, it is that the thirteenth amendment cannot be violated "by the unlawful acts of individuals."

We do not understand that we are called upon to discuss the question as to whether or not there are thousands of persons "in the Southern States" or elsewhere who are being held in a condition worse than slavery "by the unlawful acts of individuals," but, assuming that this exact situation exists, it seems to us pertinent to say that a great duty devolves upon the States wherein these parties are thus deprived of their liberty, but that absolutely no duty devolves upon the United States Government in consequence thereof, so far as the record before us discloses.

We have assumed that we have to deal only with the record of the case at bar, and this record discloses no person

as, today, being deprived of his liberty, or as in a condition worse than slavery in any State. It discloses but one person whose liberty is being threatened, and that person is Clyatt, the plaintiff in error. A sentence to four years' penal servitude is impending against him. We have submitted and still submit that his conviction was totally unauthorized by law or fact, and that this great Government, through one of its appointed agencies, has in the commission of legal errors perpetrated a most grievous assault upon his right to personal liberty. His liberty is of much concern to him, and it is of just as much concern to this Government, and it is just as much the duty of this Government to protect it, as it is the concern of the Government for the protection of the liberty of any of the thousands whom the honorable Attorney General says are being deprived of their liberty.

The Government through this honorable court has the power to protect Clyatt's liberty, it has not the power to protect the other thousands.

In the utmost respect we would also suggest the possibility—and we will use no stronger term than possibility—that assuming the Government's witnesses in "peonage" cases, wherever these prosecutions are pending, are in a "poverty-stricken condition" and that they are of a "low order of intelligence," and that they are witnesses who "may be tampered with," as the honorable Attorney General in his brief has declared them to be, may it not be true that the many prosecutions referred to are unfounded in fact? Are there not emoluments attaching to witnesses in "peonage" cases? Is it not true that witnesses who could be "tampered with" on one side might be "tampered with" on the other? Would it not be possible for designing men, in the hope of fees, emoluments, or for other purposes, to use witnesses of the class described to accomplish nefarious purposes of their own? May it not be possible, when we consider the character of the witnesses used, that the many prosecutions re-

ferred to by the honorable Attorney General could more aptly be described as "persecutions"?

Finally, we submit that an arraignment of the people of the Southern States, or of any other people, for violations of law, or for lawlessness generally, is scarcely justified when based upon the testimony of witnesses conceded to be of "a low order of intelligence" and witnesses who "may be easily tampered with."

In Conclusion.

We submit that, upon the authorities and reasoning offered, each of the three questions certified by the honorable circuit court of appeals should be answered in the negative, and that Clyatt should be awarded his liberty.

Respectfully submitted.

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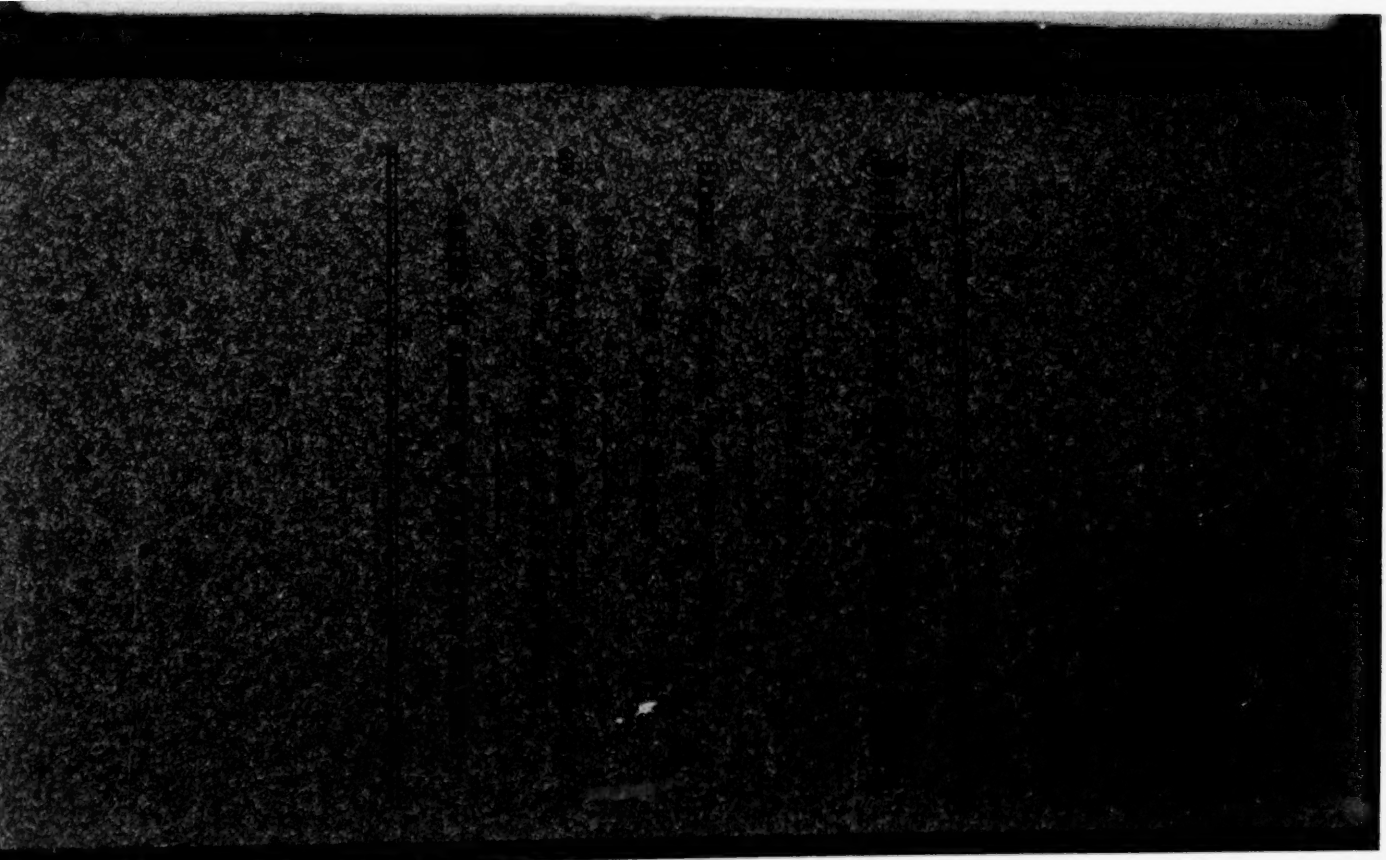

INDEX.

	Page.
Appendix	72–104
Various descriptions of Mexican peonage	72–90
(1) Description given by Judge Benedict in Jaremillo *v.* Romero	72–84
(2) Description given in Yoakum's History of Texas	84–86
(3) Description given in Bancroft's History of Mexico	86
(4) Description given in The New International Encyclopaedia	87–88
(5) Description given in Davis's El Gringo	88–90
Slavery, Repartimientos, and encomiendas	91–96
(1) Slavery—Fiske's Discovery of America	91–92
(2) Repartimientos—Fiske's Discovery of America	92–93
(3) Repartimientos—Bancroft's History of the Pacific States	93–95
(4) Encomiendas—Fiske's Discovery of America	95–96
Laws of the Territory of New Mexico from 1850 to 1860, relating to the specific enforcement of contracts for personal service, known as the peonage laws	97–104
Argument	10–71
Order of argument	10–11
Constitutionality of the Federal statutes relating to peonage.	11–44
Interpretation and scope of the Federal statutes against peonage	44–59
The existence or nonexistence of a State statute sanctioning peonage, immaterial in this case	60–63
The third question certified, as to the sufficiency of the indictment, should be disregarded	63–70
Statement of case	1–9
The case upon the certification	1–2
Importance of the case	2–3
Questions certified	3–4
The law	4–7
Mexican peonage considered historically	7–9

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

SAMUEL M. CLYATT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 235.

STATEMENT OF CASE.

On the 25th day of March, 1902, Samuel M. Clyatt, the plaintiff in error, was convicted in the United States circuit court for the northern district of Florida of the crime of having returned certain persons to a condition of peonage in violation of section 5526 of the Revised Statutes of the United States. Motions for a new trial and in arrest of judgment having been denied by the trial court, the plaintiff in error was sentenced to be confined at hard labor for a period of four years in the Federal penitentiary at Atlanta, Ga. The case was thereupon taken by writ of error to the United States circuit court of appeals for the fifth circuit. On March 16 and 17, 1904, arguments were heard in this case before the circuit court of appeals, and that court, desiring the instructions of the Supreme Court of the United States, made an order on

the 29th day of March, 1904, that three questions or propositions of law be certified to this court, in accordance with the provisions of section 6 of the judiciary act of March 3, 1891. On the 16th day of May, 1904, the Government submitted a motion to advance the case for an early hearing, which motion was granted by this court on the 31st day of May, 1904, and the case assigned for argument on the first Monday in December, 1904. On the same day counsel for the plaintiff in error submitted a motion for a writ of certiorari to bring up the entire record, and this court, on the 17th day of October, 1904, postponed the decision on that application to a hearing on the merits.

IMPORTANCE OF THIS CASE.

It would certainly be difficult to exaggerate the importance of this case in its immediate bearings upon pending and prospective prosecutions for violations of this statute in several of the Southern States. Since the conviction of the plaintiff in error in March, 1902, in the circuit court of the United States for the northern district of Florida, until the date of this certification, a period of two years, more than a hundred cases have been prosecuted by the Government and carried to a final determination under this section of the Revised Statutes concerning peonage. Immediately upon the certification of this case to the Supreme Court, as stated in the Government's motion to advance, several of the district judges in the fifth circuit, in which numerous prosecutions for violations of this statute were pending, refused to try any of the cases, and postponed the

same to await the decision of the court in this case. It is therefore quite evident that the executive arm of the law, so far at least as the enforcement of this statute is concerned, is practically paralyzed. Notwithstanding the fact that several United States courts have held this law to be constitutional, the Government is powerless to compel its enforcement or observance, even in the most typical and flagrant cases. It is useless to arrest offenders upon commissioners' warrants, in view of the fact that the witnesses, by reason of their poverty-stricken condition or low order of intelligence, may be easily tampered with, or, which very frequently happens, may be induced to leave the country.

We think that we may truthfully say that upon the decision of this case hangs the liberty of thousands of persons, mostly colored, it is true, who are now being held in a condition of involuntary servitude, in many cases worse than slavery itself, by the unlawful acts of individuals, not only in violation of the thirteenth amendment to the Constitution, but in violation of the law which we have here under consideration.

THE QUESTIONS CERTIFIED.

The following are the three questions certified to this court by the circuit court of appeals for the fifth circuit:

1. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor, to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning

of section 5526 of the Revised Statutes of the United States?

2. Is the act of unlawfully and forcibly arresting and returning a person *to the custody* and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States, when at the time of the arrest and return of such person there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage?

3. Do the acts and conduct of the defendant as charged in the indictment constitute the offense of holding, arresting, or returning to a condition of peonage within the purview of section 5526 of the Revised Statutes?

THE LAW.

The Thirteenth Amendment to the Constitution.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

(Proposed to the legislatures of the several States by the Thirty-eighth Congress on the 1st of February, 1865, and declared ratified on December 18, 1865.)

THE PEONAGE STATUTES.

Act of March 2, 1867, 14 Stat., 546.

Chapter CLXXXVII. An act to abolish and forever prohibit the system of peonage in the Territory of New Mexico and other parts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United States, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, be, and the same are hereby, declared null and void; and any person or persons who shall hold, arrest, or return, or cause to be held, arrested, or returned, or in any manner aid in the arrest or return of any person or persons to a condition of peonage, shall, upon conviction, be punished by fine not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one nor more than five years, or both, at the discretion of the court.

SEC. 2. *And be it further enacted*, That it shall be the duty of all persons in the military or civil service in the Territory of New Mexico to aid in the enforcement of the foregoing section of this act; and any person or persons who shall obstruct or attempt to obstruct, or in any way interfere with or prevent the enforcement of this act shall be liable to the pains and penalties hereby provided; and any officer or other person in the military service of the United States who shall so offend, directly or indirectly, shall, on conviction before a court-martial, be dishonorably dismissed the service of the United States, and shall thereafter be ineligible to reappointment to any office of trust, honor, or profit under the Government.

Approved March 2, 1867.

Form of the above law as it appears in the Revised Statutes.

SEC. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

SEC. 1991. Every person in the military or civil service in the Territory of New Mexico shall aid in the enforcement of the preceding section.

SEC. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both.

SEC. 5527. Every person who obstructs or attempts to obstruct, or in any way interferes with, or prevents the enforcement of, the preceding section, shall be liable to the pains and penalties therein prescribed.

MEXICAN PEONAGE CONSIDERED HISTORICALLY.

It is important to the proper consideration of this case that we have before us in the very beginning a clear understanding of at least the distinguishing features of that form of servitude which is commonly known as the "Mexican system of peonage," and which is said to have existed and reached its perfection in that country during the first half of the nineteenth century. It would be difficult, indeed, to arrive at a correct conclusion upon the question of the constitutionality of this Federal statute against *peonage* and the *system of peonage* without first ascertaining precisely the idea that Congress had in mind and understood to be the meaning of these expressions when it enacted the law in 1867.

When we consider that nowhere in the Mexican law is to be found the words "peon" or "peonage," and that the amendment of 1873 to the constitution of the United States of Mexico, which is commonly regarded as abolishing peonage in that country, does not refer to peonage or a system of peonage,[a] *eo nomine*, the question is at once suggested as to the source and origin of the expression "a system of peonage," as well as the precise nature and form of servitude which the expression "system of peonage" was supposed to characterize and distinguish from all other forms of involuntary servitude.

That a system of involuntary servitude of some form existed from time to time in Mexico from the earliest days of the Conquerors down to and including the middle of the last century will scarcely be denied. Commencing with the system of *repartimientos* introduced by the Spanish conquerors early in the sixteenth century, which system was shortly afterwards followed by the system of *encomiendas*, under which the natives of the conquered country were parceled out and divided among the conquerors, a system of involuntary servitude may be said to have existed in Mexico during a period of more than three hundred and fifty years, until 1873, when by constitutional amendment the last vestige of a system of involuntary servitude, which had assumed the form of a system of peonage, was forever abolished in that country.

While there are certain historians and students of political science who profess to see some historical con-

[a] See Appendix "A," p. 86.

nection between the systems of *repartimientos* and *encomiendas*, as established by the Spanish conquerors, and the system of peonage as it existed in Mexico during the first seventy years of the last century, we do not regard it as necessary or essential to a proper understanding and interpretation of this law to attempt to follow from an historical point of view the gradual rise and development of the peonage system in Mexico. It would seem to be sufficient, so far as the discussion of this case is concerned, if we are able to present clearly before this court an exact definition of the word "peonage" and the expression "a condition of peonage," as those words must have been understood and made use of by the Congress of the United States when it enacted this law.

The institution or system of Mexican peonage as it existed in Mexico during the middle of the last century was a form of servitude which was often if not usually voluntary in its inception, founded upon a voluntary contract for personal services for a certain definite period of time; but one of its most distinguishing characteristics was that, if the servitude for any reason during the period of the contract became involuntary on the part of the servant, the master was empowered under the sanction of positive law to require and compel upon the part of the servant a specific performance of the personal services provided for and contemplated by the contract.[a]

[a] See Appendix C for translations of various acts of the legislature of New Mexico, from 1850 to 1860, relative to the enforcement of contracts for personal services.

It is manifest that any institution or form of involuntary servitude can not be satisfactorily defined, but must be described, and we shall therefore take the liberty of quoting at length, in an appendix to this brief, from various writers who have attempted to give a comprehensive description of this peculiar system of servitude, for the purpose of establishing the fact that it was a form of involuntary servitude within the meaning of the thirteenth amendment to the Federal Constitution. (For these descriptions of the institution of Mexican peonage, see Appendix A, page 72.)

ARGUMENT, POINTS, AND AUTHORITIES.

Order of Argument.

We have heretofore considered the Mexican system of peonage from an historical point of view, and we shall assume that the descriptions of that institution as it existed and was recognized by the laws of Mexico during the middle of the last century are sufficient to show it to have been some form of involuntary servitude.

The first question presented for our consideration, therefore, is to determine whether Mexican peonage is such a form of involuntary servitude as falls within the inhibition of the thirteenth amendment to the Federal Constitution. After having shown that Mexican peonage is such a form of involuntary servitude, we will proceed to a discussion of the interpretation and scope of the act of Congress commonly known as the peonage laws of the United States, with a view to ascer-

taining whether such laws are sufficiently broad and comprehensive as to permit an affirmative answer to the first question certified by the circuit court of appeals.

The third point for consideration is whether section 5526 is operative, when, at the time of the arrest and return of a person to a condition of peonage, there existed in the State to which he was returned to be so held no State statute or usage sanctioning *peonage* or *a system of peonage*. This point is presented in the second question of the certification from the circuit court of appeals.

The fourth and final question presented goes to the sufficiency of the indictment, and which, if this case be considered upon the certificate from the circuit court of appeals, we shall maintain should, under the decisions of this court, be disregarded.

I.

Congress has plenary power under the thirteenth amendment to the Constitution to prohibit the existence of a system of peonage anywhere within the jurisdiction of the United States as a form of involuntary servitude; and Congress also has the power under such amendment to make it a criminal offense for any individual to hold, arrest, or return any person to a condition of peonage.

In order to sustain this proposition it is necessary to ascertain the precise meaning of the phrase "involuntary servitude" as the same is used in the thirteenth amendment to the Federal Constitution. It may be conceded upon the threshold of this discussion that

there exist certain forms of what are commonly regarded as a species of involuntary servitude which are not forms of involuntary servitude in the constitutional sense. Fortunately, we have a decision of this court wherein such forms of involuntary servitude have been clearly and distinctly pointed out and a rule enunciated by which it may be determined in any given case whether the involuntary servitude complained of is such a form of involuntary servitude as is prohibited by the thirteenth amendment. (*Robertson* v. *Baldwin*, 165 U. S., 275, 282.)

INVOLUNTARY SERVITUDE CONSIDERED HISTORICALLY.

On the 18th day of December, 1865, the thirteenth amendment to the Constitution prohibiting "slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted," and which had been proposed by Congress early in that year, was by the proclamation of the Secretary of State declared to have been ratified by three-fourths of the States. (15 Stat., 774.)

So far as we have been able to ascertain the phrase "involuntary servitude" was first used in an ordinance for the government of the Northwest Territory, passed by the Confederate Congress on the 13th day of July, 1787.

The first paragraph of article 6 of that ordinance is as follows:

> There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the party

shall have been duly convicted: *Provided always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid. (Compiled Statutes of the United States, 1901, vol. 1, p. lxii.)

It will be observed that the thirteenth amendment to the Federal Constitution entirely omits the language of the proviso above quoted.

Judge Cooley, in his work entitled "Principles of Constitutional Law," page 237, makes the following interesting observations upon the purposes and the scope of this amendment:

> *The Constitution.* This amendment declares, adopting the language of the ordinance of 1787, that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The word "slavery" in this country has acquired a somewhat technical meaning, and is limited to that sort of servitude which has prevailed under the State laws, namely, to servitude for life. The prohibition of slavery merely might therefore seem to be limited to this sort of service, leaving the legislative authorities at liberty to establish compulsory service for terms of years at discretion. Indeed, such servitude had existed in the early history of the country in cases of immigrants known as redemptioners, and of some others, and it would be easy to suggest

exceptional cases in which excuses might exist to enact laws for compulsory service, were the legislature so disposed. It was deemed important, therefore, that the prohibition should include, not slavery merely, but all classes of involuntary servitude not imposed as a punishment.

Involuntary servitude. The prohibition was not unimportant. Immediately following emancipation, laws were passed in some of the late slave-holding States for the compulsory apprenticeship of colored persons on terms which were made applicable to them alone, and the provisions of the indenture were such as evidently assumed the inferior and degraded condition of this class of persons and had a strong tendency to perpetuate it. In some States, also, colored persons were forbidden to engage in certain ordinary employments except on payment of a large license fee or on producing to the authorities satisfactory proof of good moral character. It was soon decided that compulsory apprenticeship under these partial and invidious laws was involuntary servitude within the meaning of this amendment and was therefore forbidden. It can scarcely be doubted that exclusion from employment may as effectually establish involuntary servitude as any use of physical force. In so far as one is excluded from entering upon common vocations the sphere of his choice is narrowed, and if the prohibition may be made applicable to one or two employments it may be extended to all but one, and at last the class discriminated against may be forced to serve in a menial employment and the nominal freedom

then becomes degrading slavery. It is, therefore, a just conclusion that any discrimination which narrows to one class, while leaving unrestricted to others, the freedom of choice in employments, must be regarded as the establishment of involuntary servitude and therefore forbidden.

But the amendment is not designed to interfere with such regulations of service in the domestic relations as were formerly admissible, including the service of minors in apprenticeship under general laws. The involuntary servitude forbidden was such as would not be tolerated by the free principles of the common law and not such as that code permitted in the case of dependent relations.

Having observed the manner in which this provision against involuntary servitude came to be incorporated in our organic law, we pass to a review of the decisions of this court wherein the phrase "involuntary servitude" has received consideration.

OPINIONS OF THE SUPREME COURT.

(1) The Slaughter House Cases, 16 Wall., 36, 67, 68, 72.

The decision in this case was rendered by Mr. Justice Miller on April 14, 1873, and appears to have been the first case wherein the phrase "involuntary servitude," as used in the Constitution, was considered by this court. Before entering upon a discussion as to the scope and meaning of that phrase, the court said:

> This court is thus called upon for the first time to give construction to these articles.

> We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

After briefly reviewing the events of the war leading up to the emancipation proclamation of President Lincoln, the court said:

> But the war being over, those who had succeeded in reestablishing the authority of the Federal Government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument.

Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands on the abolition of slavery by the English Government, or by reducing the slaves

to the condition of serfs attached to the plantation, the purpose of the article might have been evaded if only the word slavery had been used. The case of the apprentice slave held under a law of Maryland, liberated by Chief Justice Chase on a writ of habeas corpus under this article, illustrates this course of observation, and it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

And again, on page 72, the court said:

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of con-

> tinued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

In the dissenting opinion of Mr. Justice Field in the Slaughter House cases, occurs the following language which seems to in no way conflict with the views of the majority of the court as to the evident meaning of the phrase "involuntary servitude:"

> The words "involuntary servitude" have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the civil-rights act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the benefit or pleasure of others. (P. 90.)

And in the brief of Mr. John A. Campbell, submitted in behalf of the plaintiffs in error is to be found much interesting and useful matter bearing upon the question of involuntary servitude. He said:

> The thirteenth amendment prohibits "slavery and involuntary servitude." The expressions are ancient ones, and were familiar even before the time when they appeared in the great ordinance of 1787 for the government of our vast Northwestern territory; a territory from which great States were to arise. In that ordinance they are associated with enactments affording comprehensive protection for life, liberty, and

property; for the spread of religion, morality, and knowledge; for maintaining the inviolability of contracts, the freedom of navigation upon the public rivers, and the unrestrained conveyance of property by contract and devise, and for equality of children in the inheritance of patrimonial estates. The ordinance became a law after Great Britain, in form the most popular government in Europe, had been expelled from that territory because of "injuries and usurpations having in direct object the establishment of an absolute tyranny over the States." Feudalism at that time prevailed in nearly all the kingdoms of Europe, and serfdom and servitude and feudal service depressed their people to the level of slaves. The prohibition of "slavery and involuntary servitude" in every form and degree, except as a sentence upon a conviction for crime, comprises much more than the abolition or prohibition of African slavery. Slavery in the annals of the world had been the ultimate solution of controversies between the creditor and debtor, the conqueror and his captive, the father and his child, the state and an offender against its laws. The laws might enslave a man to the soil. The whole of Europe in 1787 was crowded with persons who were held as vassals to their landlord and serfs on his dominions. The American Constitution for that great territory was framed to abolish slavery and involuntary servitude in all forms and in all degrees in which they have existed among men, except as a punishment for crime duly proved and adjudged. (P. 49).

The language of the majority of the court in the Slaughter House cases is "if Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void." It will be noted that this observation of Mr. Justice Miller in the Slaughter House cases does not go to the extent of saying that *if Mexican peonage should be established within our territory it would be void*, but that *if it should develop the slavery of the Mexican race* it would be void under the thirteenth amendment. It can hardly be contended therefore that this case is an authority for holding that the system of Mexican peonage is a form of involuntary servitude within the meaning of the Federal Constitution. It is particularly interesting, in view of the fact that for the first time Mexican peonage is mentioned by this court in connection with the scope and purpose of the thirteenth amendment to the Constitution. It may be said, however, that if any labor system should develop slavery, and inasmuch as slavery in any form is prohibited by the Constitution, it would be immaterial as to the manner in which the slavery was brought about. Our contention is that if Mexican peonage or the Chinese coolie labor system is in fact a form of involuntary servitude within the meaning of the Constitution, then this amendment may be safely trusted to make it void, and confers upon Congress ample power to prohibit its existence within the territory of the United States.

(2) Civil-Rights Cases, 109 U. S., 3, 20, 23.

These cases were all founded on the first and second sections of the act of Congress known as the civil-rights act, passed in 1875, entitled "An act to protect all citizens in their civil and legal rights." Mr. Justice Bradley, in delivering the opinion of the court, had occasion to consider the constitutionality of these laws under the thirteenth and fourteenth amendments to the Federal Constitution. He said:

> This amendment (the thirteenth) as well as the fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.
>
> It is true that slavery can not exist without law, any more than property in lands and goods can exist without law, and therefore the thirteenth amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal, civil, and

political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being that the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the thirteenth amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges, and immunities of citizens which can not rightfully be abridged by State laws under the fourteenth amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was

presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a State law, there can be no doubt that the law would be repugnant to the fourteenth, no less than to the thirteenth amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

* * * * *

We must not forget that the province and scope of the thirteenth and fourteenth amendments are different. The former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United Stases, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one it may not have power to do under the other. Under the thirteenth amendment it has only to do with slavery and its incidents. Under the fourteenth amendment it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to

> deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

This court held in the civil-rights cases that under the thirteenth amendment Congress has the power, so far as is necessary and proper, to eradicate all forms of slavery and *involuntary servitude, and that such legislation may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.*

If, therefore, it be established that the system of Mexican peonage is a form of involuntary servitude, the thirteenth amendment prohibits its existence and empowers Congress to enforce such prohibition by appropriate legislation.

(3) **Plessy v. Ferguson, 163 U. S., 537, 542.**

This case turned upon the constitutionality of an act of the general assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. The constitutionality of the act was attacked upon the ground that it con-

flicted both with the thirteenth amendment of the Constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the States. Mr. Justice Brown, in delivering the opinion of the court in this case, had the following to say with reference to the scope and purpose of the thirteenth amendment:

> That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said, in the Slaughter House cases (16 Wall., 36), to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an

extent that their freedom was of little value; and that the fourteenth amendment was devised to meet this exigency.

In commenting upon the Slaughter House cases, Mr. Justice Brown observes that the thirteenth amendment was intended not only to abolish slavery but that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or *involuntary servitude*, and that the use of the word "servitude" was intended to prohibit all forms of involuntary servitude of whatever class or name. The opinion in this case, to say the least, is a very strong intimation that if Mexican peonage amounted to "involuntary servitude" it was the intention of the thirteenth amendment to prohibit its existence within the United States.

(4) **Robertson v. Baldwin, 165 U. S., 275, 280.**

This case involved the constitutionality of sections 4598 and 4599 of the Revised Statutes of the United States, requiring seamen to carry out the contract contained in their shipping articles, and authorized justices of the peace to issue warrants to apprehend deserting seamen and deliver them up to the master of their vessel. Mr. Justice Brown, in delivering the opinion of the court sustaining the constitutionality of this statute, had the following to say with reference to the meaning and scope of the thirteenth amendment to the Constitution:

> The question whether sections 4598 and 4599 conflict with the thirteenth amendment, forbidding slavery and involuntary servitude, depends

upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, providing only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract—not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823, 4 Geo. IV, c. 34, sec. 3, it was enacted

that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person, should contract to serve another, for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the thirteenth amendment, it is not within its spirit a case of involuntary servitude. The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to

keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (*United States* v. *Ball*, 163 U. S., 662, 672); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. (*Brown* v. *Walker*, 161 U. S. 51, and cases cited.) Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations or the depositions of witnesses who have died since the former trial.

The prohibition of slavery in the thirteenth amendment is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the Government, while the addition of the words "involuntary servitude" were said in the Slaughter House cases (16 Wall., 36) to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb

> the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, Where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

It is believed that this is the first case wherein the Supreme Court has attempted to point out certain forms of what is commonly regarded as a species of involuntary servitude, and show why they should not be considered as involuntary servitude, within the meaning of the Constitution, and in the concluding sentence in the above excerpt from that opinion is to be found the rule whereby in any given case it may be determined whether the involuntary servitude complained of falls within the inhibitions of the Federal Constitution. The rule is as follows:

> We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

We have, therefore, in the case at bar only to determine whether the services imposed by the master upon his servant, under the Mexican system of peonage, are such services which from time immemorial have been

treated as exceptional, and therefore not to be regarded as within the purview of the thirteenth amendment to the Constitution. This question will now be considered.

THE SYSTEM OF MEXICAN PEONAGE AND THE HOLDING OF A PERSON TO A CONDITION OF PEONAGE IS INVOLUNTARY SERVITUDE WITHIN THE MEANING OF THE CONSTITUTION.

We have seen that the holding of persons in the military and naval service of the United States is not such involuntary servitude as is contemplated in the thirteenth amendment to the Constitution, and that the rights of parents and guardians to the custody and control of their minor children or wards were not intended to be disturbed by that amendment. The case of *Robertson* v. *Baldwin* (*supra*) decides that the amendment prohibiting slavery and involuntary servitude was not intended to apply to the enforcement of contracts between the master of a vessel and sailors, involving to a certain extent the surrender of the personal liberty of the sailor during the life of the contract. In this connection it may be interesting to point out that since the decision of this court in *Robertson* v. *Baldwin*, Congress has repealed by act of December 21, 1898 (30 Stat., 755, 764), sections 4598 and 4599 of the Revised Statutes, under which deserting seamen were formerly arrested and returned to the custody and control of the master of their vessel.

It is, of course, not contended that the repeal of this law has in any manner operated to render an involuntary service under such seaman's contract an involun-

tary servitude within the meaning of the Constitution. Nor will it be contended that Congress has the constitutional power and authority to enact a law making it a criminal offense for a master to hold a seaman against his will to the specific performance of a contract for services which had been voluntarily entered into. Congress by the act of 1898 has simply withdrawn the power of the master of a vessel to invoke the aid of the courts in securing the performance of the contract on the part of the mariner.

The Government contends, however, that the enforcement of a contract for labor on the part of the master and against the will of the servant is not one of those services which has from time immemorial been treated as exceptional, and is therefore a form of involuntary servitude within the meaning of the Constitution. In order to establish this proposition it will be necessary to understand clearly the various characteristics and distinguishing features of the system of servitude which Congress had in mind when it enacted the law against peonage and made it an offense for one individual to hold another to a condition of peonage. It is easier to describe than to define the system of peonage as it existed in Mexico during the middle and early part of the last century, and I know of no better description of that system than the one given by Judge Benedict in the case of *Jaremillo* v. *Romero*, 1st Gildersleeve (New Mexico Reports), pp. 190, 206.

The great importance which attaches to the subject-matter we have considered, has, among other things, induced a general reference to the laws and enactments which authorize, regulate, and enforce, and to the authorities that illustrate the system of service between masters and servants in this Territory. This system we find to be the peon system of the country, yet in all our searches we see nowhere the term peon in any of the legislation touching the party bound to service. In all instances where we might expect to find it we invariably find servant. In the common use of language the term peon is now used in this country as synonymous with servant. Personal interests to a wide extent have been and still continue interwoven with this system. It is seen to be carefully regu lated by the legislature; that the relation of master and servant is formed by mutual contract only; that all free men and women, when no legal impediment exists, may celebrate this species of contracts; that parents can not contract away the services of their children, except in certain specified cases; that the parties in the first place may agree upon the kind of service, the duration, and the pay; that the service of the servant becomes bound to his master for an indebtedness founded upon an advancement made in consideration of service; that the servant can not leave his master's service during the time embraced in the contract unless he proves some one of the two causes to exist mentioned in the statute, or shall obtain his master's consent and shall pay what he owes

him; that if he shall refuse to serve in conformity with the contract he may be compelled to its fulfillment by the magistrate with the chastisement of fine and imprisonment; that the master may procure summary proceedings before the judicial officer to enforce compliance; if the servant is a parent, and dies, the children are not compelled to serve in his stead; that the contract may be entered into before judges of probate or justices of the peace, who shall authenticate or attest the same, as they also may accounts between the parties. A peon or servant loses none of his rights as a citizen by contracting with a master to serve him. He is under no political disqualifications; he votes at all elections, if otherwise legally qualified; his servitude does not render him under our laws ineligible to the offices of the precinct, the county, the legislature, or Delegate in Congress. (*Jaremillo* v. *Romero*, *supra*.)

From this description of the Mexican system of peonage, we draw the conclusion that there were always present certain elements which served to distinguish the servitude imposed from all other services rendered the employer on behalf of the employee.

First. The contract was usually, if not invariably, one for personal service as a servant or common laborer.

Second. The contract for services was in the first instance a voluntary one whereby the servant for a valuable consideration, either to himself or some member of his family, bound himself to his master for some specified period.

Third. This relationship after having been once established or created, the laws of the land afforded the master ample means of enforcing a specific performance of the contract, even to the extent of arresting the servant and forcibly returning him to the custody and control of the master to work out the debt.

There were many minor rights and reciprocal duties imposed by the Mexican law, both upon the master and servant, which each were bound to recognize, but which are unnecessary to be considered in discussing the power of Congress to enact this law.

If such service has from time immemorial been recognized as enforceable under our Anglo-Saxon system of jurisprudence there would exist considerable ground for the contention, in view of the decision of this court in *Robertson* v. *Baldwin* (*supra*), that the enforcement of such services is not to be regarded as within the purview of the thirteenth amendment. But if, on the other hand, the specific performance of such a contract has never been sanctioned by the common law, and was not so sanctioned by the laws of this country and England at the time of the adoption of this amendment, it would seem to follow conclusively that such service is an involuntary servitude within the meaning of the Constitution. We shall, therefore, direct our attention to an examination of this question with a view to showing that the specific performance of such contracts was not enforceable by the laws of this country or England at the time of the adoption of this amendment.

The power of the master to compel the specific performance of an ordinary contract for personal services has never been recognized either by the laws of England or those of the United States. In case the servant abandoned the service of his master before the completion of the contract, the master could always maintain an action to recover damages because of the breach of such contract, but could never compel a specific performance.

We know of no law, either in England or America, which ever authorized the master, in case the servant abandoned an ordinary contract for personal service, before the expiration of the contract, to forcibly arrest and return such servant to the work which he had deserted, and to compel a specific performance on the part of such servant of the services which he had agreed to perform.

There are a few instances in which the English Parliament and the legislatures of some of our States, especially during the period of reconstruction, have made it a criminal offense for a servant employed in the performance of certain services to abandon his work without cause before the termination of the contract.[a]

But even laws of such a character never recognized the right of the master to pursue and retake his absconding servant and to compel his performance of the work which he had abandoned. It is enough to say that no lawmaking body in any country in which the

[a] See Blaine's "Twenty Years of Congress," Vol. II, pp. 94, 97, 98, 100, 101, for reference to laws of certain of the Southern States during the period of reconstruction.

English language is spoken has gone so far in legislating upon this subject as to empower the master to exercise such despotic control over the person of his servant.

It will be observed that right here exists the difference between our laws relating to master and servant and those of the Government of Mexico, which up to 1873 recognized the master's right to retake his servant and to compel a specific performance of the contract.

Robertson v. Baldwin, supra.

Mr. Justice Brown, in delivering the opinion of the court in *Robertson* v. *Baldwin* (*supra*), took occasion to refer to the precise question which we are now discussing, in the following language:

> Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823, 4 Geo. IV, c. 34, sec. 3, it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to

> a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect (p. 281).

While the servitude under such a contract, so long as the servant continued in the employ of his master, might not, as Mr. Justice Brown says, be properly termed involuntary, yet should the servant abandon and desert his master, under what law or statute would the master be justified in pursuing and arresting his servant and returning him against his will to the specific performance of the terms of his contract? Is it not very plain that the enforced performance of services under such circumstances would not only be involuntary, but without any law or authority whatsoever to support the master in its continued enforcement? We do not understand that the statute of June 17, 1823, 4 Geo. IV, conferred upon the master any power to pursue and arrest the fleeing and absconding servant, for the purpose of returning him to an enforced and involuntary servitude; that he was made liable to criminal punishment for such desertion was one thing which the servant was obliged to suffer, should he desert the service of his master during the term of the contract, but it is quite another thing to say that because he was made liable to a criminal punishment by statute the master could return him under the law to a condi-

tion of involuntary servitude, as was the case under the Mexican peonage system.

Mr. Justice Brown says, in conclusion, that the breach of a contract for personal services has not been recognized in this country as involving a liability to criminal punishment, except in cases of soldiers and sailors, and possibly some others, and that public opinion would not tolerate a statute to that effect. We wish to emphasize this point: Suppose that public opinion should tolerate such a statute, and admitting *arguendo* that such a statute in some cases might be constitutional, we propound the further question: *Would a law be constitutional which should authorize the master to pursue and retake his fleeing servant, for the purpose of returning him to a condition of involuntary servitude to work out the debt which was due from the servant to the master under a voluntary contract for personal services theretofore entered into?* It seems to us that the mere statement of such a proposition carries with it its own answer, and that such a law would clearly be unconstitutional, as recognizing and attempting to enforce a form of involuntary servitude, such as prohibited by the thirteenth amendment.

If such a law be constitutional, by what process of reasoning can it be maintained that the individual acts of a master with respect to his servant, which in effect operate to hold such servant in a condition of involuntary servitude, without the sanction of any law, are not within the plain inhibitions of the thirteenth amendment against involuntary servitude? And if

such acts fall within its inhibitions, then surely Congress has the power under the thirteenth amendment to make the commission of such acts on the part of the master a criminal offense.

Thus it appears that the services rendered by the servant to the master under an ordinary contract for personal services have not been regarded from time immemorial as exceptional and within the same category as military and naval services and contracts between the master of a vessel and his sailors, from which we conclude, under the rule announced by this court, that the enforced performance of such contracts by the master is within the purview of the thirteenth amendment to the Constitution prohibiting involuntary servitude.

In the ninth chapter of Charles Manley Smith's treatise on the law of master and servant will be found quoted the various acts of Parliament, commencing with statute 5 Eliz. down to and including statute 4 Geo. IV, certain provisions of which made it a criminal offense punishable by fine and imprisonment, for a servant to abandon the services of his master before the termination of the contract without sufficient cause or excuse. Nowhere in those laws, however, is to be found a provision similar to the laws of Mexico sanctioning the system of peonage, and authorizing the master to hold his servant in a condition of involuntary servitude for the purpose of fully and completely performing the terms of his contract.

In the same treatise Mr. Smith has the following to say with reference to the remedies which a master may

invoke for breach of contract for personal services on the part of the servant:

> It is conceived, notwithstanding passages which may be found in the books apparently to the contrary, that no master would be justified by the law of England even in moderately chastising a hired servant of full age for dereliction of duty; and that where the books speak of a master being justified in moderately chastising his servant or apprentice they must be taken to apply only to the case of a servant or apprentice *under age*. And the only civil remedies a master has for idleness, disobedience, or other dereliction of duty or breach of contract on the part of a servant are either to bring an action against him or, as Puffendorf expresses it, "*to expel the lazy drone from his family and leave him to his own beggarly condition.*" And the circumstances which justify the discharge of a servant will also sometimes justify the non-payment of his wages. (Smith's Master and Servant, p. 72).

See also Blackstone's Commentaries, Book I, Chap. 14.

Smith's Master and Servant, p. 273.

Kent's Commentaries, seventh ed., vol. 2, p. 282.

Mary Clarke's case, 1st Blackf. (Ind. Rep.), 122.

Reeve's Domestic Relations, fourth ed., p. 418.

Covenants for personal services can not be specifically enforced; but the excepted cases of apprentices

depend upon parental authority, and of soldiers and sailors on national policy. (Mary Clarke's case, 1 Blackford's Ind. Rep., 122; Reeve's Domestic Relations, 4th ed., p. 418.)

The authorities above cited are, in our judgment, sufficient to sustain the proposition of law for which we are contending, viz., that enforced labor on the part of the servant under a contract with the master for personal services has never been regarded as sanctioned either by the laws of England or America, from which we conclude that such a case falls within the purview of the thirteenth amendment to the Constitution prohibiting involuntary servitude.

EXCEPTIONAL CASES.

We do not wish to be understood as taking the position that the legislatures of the various States, and perhaps Congress, may not have the power to make it a criminal offense for a servant under certain circumstances to abandon the service of his master. There are, perhaps, many instances in which such laws would be constitutional and not in conflict with the thirteenth amendment against involuntary servitude.

Judge Jones, in response to certain questions propounded by the grand jury in the district court for the middle district of Alabama, relative to peonage and involuntary servitude, had the following to say with reference to this point:

> It is not contended that leaving the service can not under any circumstances be made a

criminal offense. Doubtless it is competent for legislation to make it a criminal offense for an employee, without giving reasonable notice, to suddenly quit duties the continued performance of which, for the time being, under the conditions of the particular calling, is necessary to prevent the endangering of life, health, or limb, or inflicting other grievous inconvenience and sacrifice upon the public. Surely a train dispatcher, indicted for suddenly leaving the service without giving orders necessary to prevent the clash of opposing trains upon a railroad, could not successfully plead, when destruction of life and property were brought about by his sudden leaving, that he could not be punished because he did no more than breach a contract of service. In these and like cases the criminal law would be exerted not to compel performance or to prevent quitting the service in a reasonable way, but because by abandoning it in an unreasonable way the employee has created a condition of affairs, the natural, direct, and known result of which is to endanger life, health, or limb, or to inflict grievous public injury. (123 Fed. Rep., 671, 685.)

II.

INTERPRETATION AND SCOPE OF THE FEDERAL STATUTES AGAINST PEONAGE.

In the examination of this law, with a view to ascertaining its precise meaning and scope, we shall confine the discussion to the questions which, in our judgment, are necessarily involved in the statement of facts con-

tained in the first question certified. That question is as follows:

> 1. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's *creditor*, to be by him held against the will of the *debtor* to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States?

The facts stated in this question, and which are presumably alleged in the indictment and sustained by the evidence, are as follows:

> First. The act of unlawfully and forcibly arresting and returning one person to the custody and control of another.
>
> Second. The relationship of creditor and debtor between the party arresting, and the party so arrested, without regard to the cause, origin, or nature of the debt.
>
> Third. Such arrests must be made with a view to holding the party against his will to some kind of labor in liquidation of a debt, without regard to the particular character or nature of the work to be enforced.

If the case at bar presents such a state of facts, and we must assume that it does, for the purpose of answering this question upon the certification, we have only to examine the law in order to determine whether such a case comes fairly within the inhibitions of the statute. Such an examination necessarily involves several important questions which we shall now take up in their order.

(1) If this law does not regard the origin or character of the debt or the manner in which it was created, but only the existence of the debt itself, it is manifest that the words "creditor" and "debtor" appropriately describe the relation of the parties and are within the purview of the statute.

It may be conceded *arguendo* that under the Mexican system of peonage, as it existed in that country during the early part of the nineteenth century, a voluntary contract between the master and servant for personal services was first necessary in order to give effect to the laws of that country enforcing a specific performance of such a contract. While such fact is interesting from an historical point of view, it is quite evident that abuses grew up under the protection of such a system, until creditors, without regard to the origin of the debt, sought to enslave the debtor under this form of involuntary servitude in liquidation of the debt.

It appears clearly from an examination of the Territorial statutes of New Mexico, which are set forth in Appendix C, that in order to create the relation of master and peon, in conformity with the letter of the Mexican law, the contract of service must have been entered into at the inception of the relation. It, however, was inevitable, as the experience of all history shows, that others should find themselves held to service or labor as peons. That Congress recognized this truth appears by the closing words of Senator Wilson's remarks in the Senate, hereafter cited, in which he says,

"It is a system of modified servitude, which is

> carried on to a great extent in New Mexico, and especially to a lamentable extent with the Indians. A great many Indians are captured and forcibly held in servitude."

and from the peculiar language of the statute (section 1990) speaking of "voluntary or involuntary service or labor of any persons as peons." It is clear Congress had no constitutional authority to deal with the voluntary service of one man to another and that the words "voluntary or involuntary" refer only to the beginning of the relation of master and peon. The statute is designed to deal with the involuntary labor or service of persons as peons, whether in its origin the service was voluntary or involuntary.

That these abuses existed in New Mexico at the time of the passage of this law against peonage there can be little doubt. Our contention is, therefore, that Congress, in the enactment of this law, intended to abolish and make penal the act of any individual in holding his debtor to serve him against his will, in payment of the debt, without regard to the manner in which the debt arose. This intention upon the part of Congress is ascertained from an examination of the debates in Congress when the law was enacted, and from a critical analysis of the law itself.

THE LEGISLATIVE INTENT.

(a) As gathered from the debates in Congress when the law was enacted.

This law was known as Senate bill No. 543, and does not appear to have provoked any discussion

whatever in its passage through the House. (Cong. Globe, vol. 76, p. 1770.) In the Senate, however, we find that the bill was discussed at considerable length before its final passage through that body. Senator Wilson, of Massachusetts, had charge of the bill in the Senate, and in response to a question from Senator Davis, of Kentucky, asking for a clear, succinct, and comprehensive definition of the term "peonage," said:

> It is a condition of modified servitude, which we have inherited from Mexico. It exists in New Mexico at this time, the only part of the country where I know it does exist. In some cases it is voluntary, but in most cases forcible. In the larger towns it is disappearing, but in a portion of the country it still exists; and what is more, officers of the United States, military and civil, have been carrying it out. The object of this bill is to arrest it, to make it the duty of the civil and military officers of the United States in the Territory to put an end to the system and not support it. A report was made by one of the officers of the Government, one of the Indian agents, to the Indian Bureau, showing how persons were held in service; that officers of the United States held these persons in service, and that Colonel Davis, under the direction of General Carleton, had undertaken to enforce this law or custom in New Mexico, We intend by this bill to put an end to the system. It is a system of modified servitude which is carried on to a great exent in New Mexico, and especially to a lamentable extent with the Indians. A great many Indians are captured and forcibly held in servitude.

Senator Lane, of Indiana, said:

> By the laws of Mexico, which were existing in New Mexico at the time of the conquest, peonage was established. The system was simply this, as I understand it: That where a Mexican owed a debt his creditor had a right to his labor and services until that debt was paid. The debtor became a domestic servant, and he and his family were supported by the creditor, and the peonage never ended until the debt was discharged. It was a kind of servitude for debt, which the committee thought was inconsistent with our institutions. We simply say by this bill that peonage shall be abolished, and the creditor shall be left to all his legal means of collecting his debt, but he shall not hold the peon in slavery. I understand also that by this system the creditor not only had the right by an involuntary process to the labor of the peon, but the debtor, if he chose, might become the servant of the creditor and serve until the debt was paid. A very small debt with the interest, where the peon has a family to support and the creditor supports him, amounts to a servitude for life. We now simply say that the creditor in New Mexico shall have all the means of collecting their debts known to the law, but that peonage or servitude for debt shall cease. That is the whole of it.

Senator Davis, of Kentucky, replied in part as follows:

> Well, Mr. President, I have been for a good many years of my life in about the same state

> of slavery that my friend from Indiana represents the peons of Mexico to have been. I have owed considerable debts and I have worked mighty hard to pay them. All the proceeds of my labor went to the payment of my debts, and I had not the advantage which the peon has; the creditor was not supporting me during the time I was laboring to discharge my debts; I had to support myself. (Cong. Globe, vol. 76, p. 1571.)

Other Senators during the course of that debate gave expression to what they understood as the distinguishing characteristics of "peonage" and the "system of peonage" as it existed at that time in the Territory of New Mexico, and the evils and conditions incident to such a form of involuntary servitude which in their opinion the proposed law was designed to operate upon and eradicate.[a]

It is worthy of note that the Senators constantly referred to creditor and debtor without the further qualification of master and servant, and this broad idea of the scope and purpose of the proposed law we find clearly reflected in the law itself.

We must keep constantly before our minds that the power of Congress to legislate against involuntary servitude, under the thirteenth amendment, is plenary, covering all forms of involuntary servitude, which, as we have shown, have not from time immemorial been regarded as exceptional. Therefore Congress had the

[a] See testimony of Judge Benedict and others before joint special committee. Senate reports, second session Thirty-ninth Congress (1866–67), pages 325–323–334.

constitutional power to make it a criminal offense for a creditor, without regard to the origin or manner in which the debt was created, to enslave his debtor and hold him in a condition of involuntary servitude for the purpose of paying the debt. With this idea of the power of Congress clearly before us, let us turn for a moment to the consideration of the law itself.

(b) The Law.

The portion of this law which was subsequently incorporated in section 1990 of the Revised Statutes shows with peculiar force precisely the form of servitude which Congress had in mind, the existence of which it was the design of Congress to make unlawful. The law reads:

> And all acts, laws, resolutions, * * * of the Territory of New Mexico, or of any other Territory or State * * * by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce directly or indirectly the voluntary or involuntary service or labor of any persons as peons in liquidation of any debt or obligation, or otherwise, are declared null and void.

The language of the law is "in liquidation of any debt or obligation, or otherwise." From this broad language we reason that the prohibition included more than a master holding his servant to labor against his will in liquidation of a debt arising by virtue of a voluntary contract for personal service, and was designed to prohibit any creditor from holding his debtor against his will to work out a debt.

And again the law uses the expression, "the voluntary or involuntary service or labor of any persons as peons." Of course, no one would contend that Congress intended to prohibit "voluntary" service or labor in payment of any debt, and apparently the only force which can be given to the word "voluntary," as used in this statute, is that it was intended to apply to such service or labor which in its inception was voluntary, but which subsequently became involuntary. This interpretation lends additional support to the contention that the statute was intended to cover services which were involuntary from their inception, and in this respect at least justifies the conclusion that the law was designed to include something more than peonage in its strict legal sense, according to the Mexican law.

While it is true that this portion of the statute is directed specifically against Territorial and State action, it would seem that it has an important bearing upon the form of servitude which Congress was endeavoring to eradicate.

(c) According to the definitions of lexicographers of that day the word "peon" was not confined to a person compelled by the master to perform involuntary service in liquidation of a debt under a contract for personal service, but included any service by which one person was bound to serve his creditor until the debt was paid.

Webster's Dictionary, edition of 1865:

> *Peon.* (Fr. peon, a foot soldier in India; Sp. peon, one who travels on foot, a foot soldier, a pawn in chess; Hind. piyadah, a foot soldier. See Pawn.)

1. A footman; a person of low rank; as, specifically, (a) One traveling on foot; a pedestrian. (b) A foot soldier; hence, in India, a native constable. (c) A day laborer; a servant; *especially in Mexico, a debtor held by his creditor in a form of qualified servitude, to work out a debt; a serf.* (d) A piece used in the game of chess, representing a footman; a pawn.

2. An East Indian wood used in shipbuilding. See Poon wood.

3. A hive of bees.

Ever since about the middle of the last century lexicographers have given as one of the definitions of a peon, especially in Spanish America, "a debtor held by his creditor in the form of a qualified servitude to work out a debt," and it is very evident that Congress had in mind this idea of the word at the time of the passage of this law in 1867.

While the ordinary meaning of the word "peon" did not convey any idea of involuntary servitude under the laws of Mexico sanctioning the specific enforcement of a contract for personal services, this additional idea and meaning became attached to the word "peon" probably by reason of the fact that those laws of Mexico usually operated upon peons or common day laborers. However this may be, it is quite apparent that from the debates in Congress, from the language of the law itself, and from the definitions given by lexicographers of that day, this law was designed to prevent a creditor from holding his debtor against his will to labor to pay the debt without regard to the manner in which the debt was created.

(d) This statute is sufficiently broad to prohibit a creditor from holding his debtor to labor to pay the debt, without regard to the character of the work imposed upon the debtor by the creditor. Therefore the phrase "to labor," as used in the first and second questions certified, brings the case within the scope of the statute.

Upon reading the first and second questions certified, the point is at once suggested as to whether this statute, prohibiting the holding of a person as a peon or in a condition of peonage, has any regard to the character of the services required to be performed. The phrase "to labor" is evidently a very comprehensive expression, including all kinds of services, whether menial or professional, skilled or unskilled. If the first and second questions are to be answered upon the certification, it is important to determine whether the phrase "to labor" at any kind of work in payment of the debt is within the inhibitions of the statute. Our contention is that the character of the service is immaterial, the one idea in the legislative mind being to prohibit an enforced servitude in liquidation of any debt.

THE LAW.

The first portion of the act of March 2, 1867, is as follows:

> That the holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States.

The language of the provision above quoted is exceedingly broad and comprehensive, prohibiting the holding of any person "to service or labor," without regard to the nature or the character of the service imposed, unless the phrase immediately following, to wit, "under the system known as peonage," be interpreted as a limitation upon the character of the service required. Our contention is that the phrase "under the system known as peonage" was designed to characterize the manner of the holding rather than the nature of the service or labor imposed. The meaning of the statute may be more clearly shown by a simple transposition of this phrase, making the law read as follows:

> That the holding of any person, *under the system known as peonage*, to service or labor is hereby declared to be unlawful, etc.

We are again met with this same question when we come to consider another portion of this law, which declares null and void all laws or usages of any State or Territory by virtue of which any attempt shall hereafter be made to establish or enforce, directly or indirectly—

> Involuntary service or labor of any persons *as peons*, in liquidation of any debt or obligation, or otherwise.

The phrase "service or labor of any persons *as peons*" at once suggests the idea that possibly Congress had in mind the character of the service, the enforcement of which in payment of a debt it was designed to prohibit.

It is evident that the phrase "as peons" is susceptible of two constructions, one *modifying the nature of the service or labor* and confining the same to service *as a peon or day-laborer*, the other *as descriptive of the manner of the holding;* that is to say, *as a debtor held by his creditor in liquidation of a debt.*

In determining which of these two interpretations is the correct one we must keep in mind that Congress was legislating with a view to protecting the debtor from an enforced servitude at the hands of his creditor, and that while such form of servitude was found to exist with reference to peons or common laborers, this form or species of servitude, by which a creditor held his debtor to labor to pay the debt, was the thing which Congress was attempting to strike down by this law. We therefore conclude that the phrase "as peons," as used in this law, *is descriptive of a particular form of servitude*, and was not designed to limit or modify the character of the labor or service which might be imposed by the creditor upon the debtor.

Another reason which may be urged in favor of this interpretation of the law is the fact that the statute makes no distinction as to the character or origin of the debt. If any creditor is prohibited from holding his debtor to labor in liquidation of the debt, there can exist no good ground for the contention that if the labor or services imposed are confined to such services as a peon or day-laborer usually performed, such an act would be within the statute, but that if the labor or service imposed be such as required special knowledge

or skill, in such case such an act on the part of the creditor against the debtor would not be within the inhibitions of the statute.

INTERPRETATION AND CONSTRUCTION OF SECTION 5526 OF THE REVISED STATUTES.

Section 5526 of the Revised Statutes prohibits and makes penal the acts of an individual in holding, arresting, or returning any person to "a condition of peonage," which is equivalent to saying that no person shall be held by another against his will to labor for his creditor in liquidation of a debt. We have seen that the manner in which the debt or obligation arose was not considered by the framers of this law, and that the nature or character of the services imposed by the creditor upon the debtor was likewise immaterial. The *condition* of a person held to labor to pay a debt differs in no essential manner, so far as the form of the involuntary servitude is concerned, from that of a servant who is held by his master against his will and compelled to labor in liquidation of a debt created under a voluntary contract for personal services. The degradation of the person so held to service may be just as great in the one case as in the other.

IN A CONDITION OF SLAVERY.

Perhaps the laws of all countries which have maintained slavery as a legal institution have recognized the right of property in the slave as its principal and essential characteristic. It may be said that slavery

in its strict legal sense does not exist if the owner of the slave does not have the right under the sanction of positive law to buy and sell his slave in substantially the same manner as any other chattel.

> It is true that slavery can not exist without law any more than property in lands and goods can exist without law, and therefore the thirteenth amendment may be regarded as nullifying all State laws which establish or uphold slavery. (Civil Rights cases, 109 U. S., 3, 20.)

Thus, while law is necessary to the existence of slavery in its strict legal sense, it requires no argument to prove that *a condition of slavery* may be maintained by the unlawful acts of individuals, although the right to buy and sell the person enslaved be not secured by law.

If, instead of the law which we have here under consideration, Congress had enacted a law against holding, arresting, or returning a person to "a condition of slavery" (see section 5525 Revised Statutes), could it be maintained upon a criminal prosecution against an individual charged with the commission of such offense that the person so held to involuntary servitude by the defendant was not being held in a condition of slavery, for the reason that it did not appear that the defendant had bought the person so held to involuntary servitude, or had ever attempted to sell him as a chattel? In construing such a law would not this court say that, while those elements of slavery which are inseparably associated with the institution of slavery are absent, such a statute was nevertheless

designed to prohibit the holding in a condition of slavery, and that such a condition may exist without there being present all the elements necessary to constitute slavery in its strict legal sense? In other words, such a statute would strike at the *form* of the servitude imposed.

IN A CONDITION OF PEONAGE.

By a parity of reasoning it may be maintained that if one individual unlawfully and forcibly arrests another and holds him in his custody and control against the will of the party so arrested, to labor to pay a debt, such person is held in precisely the same condition, so far as the form of servitude imposed is concerned, as was the peon or servant under the system of peonage as it existed in New Mexico. The *form* of such servitude would be that of a creditor holding his debtor to labor to pay the debt, and this fact alone serves to distinguish such form of involuntary servitude from all others. That there may be many modifications of this species of involuntary servitude may be admitted. Our contention is, however, that the phrase "in a condition of peonage" is broad enough to cover all modified forms of this particular species of involuntary servitude, and that if in any given case it appears that a debtor is held against his will by the creditor to labor to pay the debt, it is unnecessary to go further, for the reason that the statute is broad enough to include such a form of servitude within its inhibitions.

III.

The existence or nonexistence of a State statute or usage creating or sanctioning peonage or a system of peonage is wholly immaterial, so far as the operation and effect of section 5526 is concerned, upon the acts of individuals.

It is difficult for us to appreciate the logic in support of the proposition that this law is only applicable in those portions of the United States in which there existed at the time of the commission of the acts complained of a State statute or usage creating or sanctioning peonage or a condition of peonage. There is certainly nothing in the law itself giving the least color or force to such a contention, and were it not for the fact that the circuit court of appeals has with such evident deliberation propounded this question to this court in its certification, we would be inclined to dismiss the subject without argument.

SECOND QUESTION CERTIFIED.

> Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor, to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States, when at the time of the arrest and return of such person there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage? (Rec., p. 23.)

That the existence of a State statute or usage sanctioning a particular form of involuntary servitude is immaterial, so far as the prosecution of individuals is concerned, has been frequently decided by this court. In the Civil Rights cases (*supra*), Mr. Justice Bradley, in delivering the opinion of the court, said:

> Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.
>
> * * * * *
>
> But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a State law there can be no doubt that the law would be repugnant to the fourteenth, no less than to the thirteenth, amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted (pp. 23, 21).

It appears that this same question was before the United States district court for the middle district of Alabama in June, 1903, when United States District Judge Jones delivered a charge to the grand jury in response to questions propounded by that body relative to peonage and involuntary servitude. (*Peonage cases*, 123 Fed. Rep., 671, 678.) Judge Jones completely refutes this argument in the following language:

> When Congress, in the exercise of power

granted by the Constitution, declares certain acts criminal offenses against the United States, no State or Territorial law or custom, or the absence of them, can purge the offense of its criminality, or suspend, or control, or effect the right of the United States to punish that offense. Remembering that Congress not only explicitly struck down State or Territorial laws which upheld the system, and forbade and annulled any future attempt by any State or Territory to renew the system, but went further in order to make its policy more effective, and imposed punishment upon individuals, the conclusion is irresistible that Congress never intended that the penalties denounced against individual acts should depend for their operation or enforcement in anyway upon anything a State or Territory might or might not do, or the maintenance of any custom looking to a revival of the "system" which the State or Territory or locality was forbidden to attempt. The good custom and habit of a locality, Territory, or State not to violate, or attempt to nullify, a provision of an act of Congress can not be pleaded to shield an offender against that law because his acts are an exception to the prevailing rule or custom of obedience to law in that State or Territory. Congress never intended, when it denounced the holding to "a condition of peonage" of "any person" by "every person," that this law for the protection of liberties of citizens of the United States should be partial or local in its operation, or that individuals might violate this general statute of freedom with impunity, unless the State or

> Territory in which the offense occurred attempted to do something it had no power to do, or the offense was of such frequent occurrence, and committed by so many persons there, as to amount to a custom to violate the act of Congress. It is a new doctrine in jurisprudence that the good behavior of an offender's neighbors, or the observance by the State of valid laws passed in pursuance of the Constitution of the United States to punish an offense, is to be taken into account in determining whether there has been a violation of a penal enactment which is leveled at misdeeds of individuals as well as the misuse of authority by States and Territories.

We respectfully submit that so far as the enforcement and operation of this statute is concerned, the question of the existence of a State law or usage creating or sanctioning peonage or a system of peonage is entirely immaterial.

IV.

The third question certified, which goes to the sufficiency of the indictment, necessarily involves an answer to several separate and distinct points of law, and will, for that reason, under the rules of this court, be disregarded.

The third question contained in the certification from the circuit court of appeals practically calls upon this court for a critical examination of the indictment with a view to determining whether it sufficiently charges a public offense under section 5526 of the Revised Statutes. It is unnecessary to lay stress upon the fact

that the indictment is not in any legal way before the court, because the authorities show clearly that if it were here the court would decline to answer the question. The question certified is as follows:

> Do the acts and conduct of the defendant as charged in the indictment constitute the offense of holding, arresting, or returning to a condition of peonage within the purview of section 5526 of the Revised Statutes?

It is important that we examine this question, so certified, for the purpose of ascertaining whether, according to the decisions of this court, it presents a single question of law which may be distinctly answered, or whether the question in this form necessarily involves or may involve the examination and determination of several separate and distinct questions or propositions of law.

In the recent case of *Felsenheld* v. *The United States*, 186 U. S., 126, 134, this court took occasion again to reaffirm the rules which must be observed and strictly followed respecting the certification of questions by the circuit court of appeals. Those rules were thus stated by the present Chief Justice in *United States* v. *The Union Pacific Railway Company*, 168 U. S., 505, 512, as follows:

> It is settled that the certification provided for in sections 5 and 6 of the judiciary act of March 3, 1891, c. 517, 26 Stat., 826, is governed by the rules laid down in respect of certificates of division under the Revised Statutes. (*Columbus Watch Company* v. *Robbins*, 148 U. S., 266;

Maynard v. *Hecht*, 151 U. S., 324; *Graver* v. *Faurot*, 162 U. S., 435; *Cross* v. *Evans*, 167 U. S., 60.)

By those rules, as repeated in these cases from prior decisions, "each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions." (*Fire Insurance Association* v. *Wickham*, 128 U. S., 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S., 510; *Felsenheld* v. *United States*, supra, p. 134.)

On authority of these cases, it is settled beyond controversy that the certification provided for in sections 5 and 6 of the judiciary act of March 3, 1891, under which the questions in this case were certified to this court, is governed by the rules laid down in respect to certificates of division under the Revised Statutes. It therefore follows that if this question respecting the sufficiency of the indictment is not in conformity with the rules laid down in respect to certificates of division under the Revised Statutes this court will refuse to give it consideration.

We have therefore only to examine the cases wherein questions of a similar character were presented to this court upon certificates of division under the Revised Statutes.

United States v. Northway, 120 U. S., 327, 328, 329.

This case came to this court upon a certificate of division of opinion as to the sufficiency of the counts in an indictment for abstracting and misapplying the funds of a national bank. The first question certified was as follows:

First. Whether either of said counts charges defendant with an offense under the laws of the United States.

Mr. Justice Matthews, in delivering the opinion of the court, had the following to say with reference to this question:

> The question whether either of said counts charges said defendant with an offense under the laws of the United States, which is the first one certified, we decline to answer, for the reason that is is too vague and general within the act of Congress authorizing certificates of this character and the repeated decisions of this court.

The purpose of this rule of law, relative to the certification of questions to the Supreme Court, is obvious. The precise point of law must be clearly stated so that it can be distinctly answered without regard to the other issues of law in the case. To require the Supreme Court to pass upon the sufficiency or insufficiency of

an indictment manifestly might involve an examination of several separate and distinct questions of law such as the sufficiency of each separate allegation contained in the indictment and as to whether any essential allegation has been omitted. If this court should attempt to answer this question in its present form and approve or disapprove this indictment, it would be compelled not only to examine each of the various allegations contained in the indictment, and decide as to the sufficiency of each, but it would also be required to determine whether any material allegation has been omitted. This would involve, we submit, an answer in the form of a single question, several separate and distinct questions of law which are necessarily included within the question.

United States v. Hall, 131 U. S., 50, 52.

This case came before the Supreme Court upon a certificate of division of opinion between the judges of the circuit court of the United States for the district of California. There were six separate and distinct questions certified to this court for its opinion, among which were the following:

> 1. Do the facts set forth in this indictment constitute an offense under section 5418 of the Revised Statutes of the United States?
>
> 2. Do the facts alleged in this indictment constitute an offense under section 5438 of the Revised Statutes of the United States?

Mr. Justice Miller, in delivering the opinion of the court, held that these questions did not present sepa-

rate and distinct points of law, as required by the decisions of this court respecting certificates of division. He said:

> Most of these are, by the settled doctrine of this court, insufficient to invoke its jurisdiction. They seem eminently liable to the objection that they are designed to split up the case before the court into fragments upon which, before a trial or decision by that court, it is intended to obtain the opinion of this court. There are none of them, except the last one we have mentioned, which present, in the manner that we have frequently pointed out, clear and distinct propositions of law to which this court can respond. (*Fire Insurance Association* v. *Wickham*, 128 U. S., 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S., 510.) But they require, if they should be answered at all, an examination of this very voluminous and loose statement of facts found in the indictment before an answer could be made, and even then there is no certainty that the answers would turn upon any difficulty existing in the minds of the court which framed them for our consideration.

United States v. Perrin, 131 U. S., 55, 57.

This case also came before the Supreme Court by virtue of a certificate of division in opinion between the judges holding the circuit court of the United States for the district of California. The certificate contained seven questions, each of which practically

and in effect challenged the sufficiency of the indictment. The court said:

> We are not able to discover in any of these points that clear and distinct presentation of a question of law which we have so repeatedly held to be necessary to invoke the action of this court. Indeed, they are but a repetition in various forms of the question whether the indictment presents facts sufficient to constitute an offense under the statute against conspiracy. The indictment is so diffuse and obscure, presenting in no point a distinct issue of law on which the guilt of the defendants must rest, that it is impossible to decide any of the points without the most laborious wandering through the whole of the three counts of the indictment, and passing upon the whole question whether, under all the circumstances set out, the parties are liable to the indictment.

(See also *Maynard* v. *Hecht*, 151 U. S., 324, 326; *Sparf and Hansen* v. *United States*, 156 U. S., 51, 176.)

United States v. *Waddell et al.*, 112 U. S., 76–81.

United States v. *Chase*, 135 U. S., 255.

United States v. *Lacher*, 134 U. S., 624.

United States v. *Brewer*, 139 U. S., 278.

United States v. Waddell et al., 112 U. S., 76.

This case came before the Supreme Court on a certificate of division from the circuit court of the United States for the eastern district of Arkansas, and the second question certified was—

> Whether the information in said cause charg-

> ed any offense under said section 5508 of the Revised Statutes of the United States or against any statute of the United States.

This court answered that question in the affirmative, from which it may be argued that a question presented in such form complies with the requirements of the rule respecting questions upon a certificate of division. It will be found, however, upon an examination of the opinion delivered by Mr. Justice Miller, that the court confined its inquiry respecting the sufficiency of the information to the points of law necessarily involved and discussed under the first question presented. The case is, therefore, not in conflict with, but an authority upon, the proposition for which we are here contending.

CONCLUSION.

We have confined our discussion to a consideration of this case upon the certification, and if we are right in our interpretation of the law, it necessarily follows that the first and second questions should be answered in the affirmative, and that this court should decline to answer the third question certified, for the reason that it does not present a single, separate, and distinct question of law.

If, however, this court should hold that the interpretation of the law for which the Government is contending is too broad, it follows that the statement of facts contained in the first and second questions propounded is also too broad, and that therefore no decision can be rendered without inferring an additional

fact or facts not contained in such statement. In such view of the case, considered upon the certification, this court would, of course, decline to answer such questions. (*Jewell* v. *Knight*, 123 U. S., 426; *Sigafus* v. *Porter et al.*, 85 Fed. Rep., 689.)

Respectfully submitted.

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APPENDIX A.

VARIOUS DESCRIPTIONS OF THE MEXICAN SYSTEM OF PEONAGE.

(1) Description given by Judge Benedict, in delivering the opinion of the court in the case of Jaremillo v. Romero, New Mexico Reports, 1 Gildersleeve, pp. 190, 194-199, 201, 204-207.

Upon the entry of the power of the United States within this Territory in 1846, and establishing their rule and government, there was found a large class of persons commonly designated in the language of the country by the name of peons. They were not of any particular color, race, or caste of the inhabitants. They appeared as servants, menials, or domestics, "bound" to some kind of "service" to their masters. Generally they had none or small amounts of property. The most wealthy and powerful families were flattered in their pride in displaying their retinues of these dependents. Many had been raised from childhood within the households of such families. One fact existed universally—all were indebted to their masters. This was the cord by which they seemed bound to their masters' service. It was an invariable rule that the peon could discharge himself from this service by the payment of his indebtedness to his master, and the latter never supposed he had any right to refuse or receive his pay from his peon and still hold him to service. It was common for persons desiring to engage in their employ as servants those owing, as peons, their masters, to advance to them the amounts due, and upon payment to the satisfaction of the old master, the peon left him

and went to the service of the new; and these, as by voluntary contract, regarded the labor of him who had the peon's position as pledged for the payment of the money which had been advanced to pay his former master, as also for any other advancement. Upon entering the new service, or while continuing therein, the peon was held rigorously to fulfill his pledge and render his labor so long as his debts remained or an additional one was incurred. He could not abandon the service; and if he did his master pursued, reclaimed, and reduced him to obedience and labor again; and the alcaldes of the country in the most summary manner aided the master in bringing back his fugitive. Both male and female became peons, and the price of their labor was variously estimated at from one to six dollars per month.

We turn now to inquire for the legislative act which established these rules between peon and master. Vassals and vassalage had ceased to exist under the Spanish monarchy, and had not been restored by the Mexican Government. The cortes of Spain, on the 6th of August, 1811, decreed that "the titles of vassals and vassalage are abolished, and also the grants, as well real as personal, which have taken their origin from this title of jurisdiction, except those proceeding from voluntary contracts, in the free exercise or the sacred use of property." In the same manner all contracts, agreements, and conventions which may have been made in consideration of advantage, rents, or annuities of land, or others of this kind, entered into between the so-called lords and their vassals, ought in future to be considered as contracts made between private individuals. Upon careful examination of all the authorities within our present reach, we have been unable to find any

law creating and defining the duties and rights, the civil and domestic relations, under the specific denomination of peon, while the Spanish and Mexican laws and authorities are replete with rules clearly marking out the legal rights and duties of masters and servants. If we turn to the lexicographers, we find Mr. Webster, in his dictionary, defines the word peon to mean, in Hindoostan, a foot soldier; in France, a common man; in chess, written and called pawn. From him we learn nothing as to its meaning in Spain or Mexico. In the Spanish and English dictionary by Velasquez, peon is defined variously; such as pedestrian, day laborer, foot soldier, pawn in chess, anything that is whirled round in play, hive of bees, servant, menial, and groom. It also says that the word, as used in America, means an Indian hired to work by the day. From the last definition of "an Indian hired to work," it is suggested that the condition of a peon originated in Mexico, in the workings of the system of *repartimientos*, or distributions of certain sections of country, including the native inhabitants, made by the early Spanish conquerors among their comrades and followers.

Escriche, in his Diccionario Legislativo, understood to be received throughout Spain and all the nations upon this continent speaking the Spanish language as of the very highest authority, says, in the Madrid edition, published in 1847, in volume 1, page 184, "that the rights and duties attached to the condition of master and servant depend entirely upon contract." The obligation of the respective parties to abide faithfully by the agreement, will be found under the head *amo* (master) to be lucidly and accurately defined. It will be seen that without lawful cause the servant could not

leave his master during the time the contract was to endure, and if he should he might be compelled to return or pay the damages caused by his abandonment. Under the head of *arrendamiento* it is said that hiring to personal service is a contract which obligates one of the parties to do something for another, in consideration of a certain price. The most frequent contracts of hiring and leasing of personal labor are those made with persons in the character of servants, domestics, or dependents, who obligate themselves at day abor, that is to say, at so much per day, and for that reason they are called day laborers, such as reapers, workers in vineyards, load carriers, diggers, etc.

In White's Recopilación, volume 1, pages 201, 202, it is said: "The second onerous contract is that of renting, by which one person lets or grants to another person the service of his person or beast, or the use or enjoyments of a thing for a certain time." This contract, then, consists in three things: In the consent of the parties, in the thing or labor which is rented or let, and in the price. Renting derives its perfection from consent. The renter is obliged to perform the labor stipulated. Anyone may rent who can sell and buy, the agreement being for a certain time, or for the life of either of the contracting parties. This contract admits every covenant or part that may not be opposed to the laws and good customs.

Schmidt's Civil Law of Spain and Mexico designates unlawful objects of contracts to be such as murder, robbery, adultery, etc., and acts contrary to decency and good morals, as the going naked in the streets, and also the sale of a man's liberty, although he may sell his services for a limited time (pp. 113, 114). As to the hiring and letting of work and labor (page 170)

he says: "The object of this contract extends only to such work as is not considered liberal industry. No one is permitted to hire his personal industry, except for a fixed object and determinate period. The obligation of a workman to furnish his labor expires on his death and his heirs are not bound to continue it or to finish the work he may have begun."

These quotations are sufficient to manifest the general principles upon which the conditions of master and servant were formed where the Spanish law prevailed. It will not be denied that they extended to Mexico when she achieved her independence. It is seen that the consent of the parties was invariably the foundation upon which a servant became bound to service. When Mexico became an organized republic of States some of them legislated upon this relation, especially detailing the legal consequences which should flow therefrom, and also prescribing the modes by which the agreement might be perfected. This legislation serves to illustrate the Mexican spirit upon this subject, discloses the state of menial service then existing, and will aid in strengthening our views when we come to examine the act of the assembly of this territory upon the same matters.

On the 30th of September, 1828, the Congress of Coahuila and Texas passed a decree, clear and pointed. It begins by assuming that the relations of masters and servants were existing within those two States, and says: "Debts contracted by hired servants with their masters previous to the publication of this law shall be paid in the same manner and form they have bargained." (White Recopilacion, 525.) We see in this how carefully the Congress guarded against the violation of the obligations of previous contracts. All was preserved

in manner and form as bargained. The decree then proceeds to regulate for the future: "In future when a servant obtains employment, the contract he makes with his master shall be set down at the head of the account, wherein shall be manifested the manner he is to pay the debt he contracts. The agreement shall be authenticated by two witnesses and signed by the same, the master, the servant, if he can write, or another person in his name. Amounts ministered to servants in part payment for their labor shall be in money or effects, not exceeding the ordinary prices of the market, and both master and servant shall be entirely free, the one to accept and the other to furnish. In future no payment shall be made in advance to exceed what the servant can obtain as the reward of labor with the whole of one year's wages. The master shall show the servant his account as often as requested, and the latter may sue the former before the alcalde when he thinks himself aggrieved by illegality or any other cause.

"In haciendas, agricultural ranches, or any other establishments situated out of towns, masters, superintendents, and stewards are hereby authorized to punish servants who fail in the faithful fulfillment of their duties or disobey their superiors, by arrest not exceeding four days, or with shackles for the same length of time. When the master enters a complaint to the alcalde on account of the incorrigibility of the servant, the alcalde may punish him with shackles or other correctional penalties to cause him to return to his duty."

Such were the chief articles of that decree, and without doubt were based in the main upon the general custom and practice then prevailing. The makers of the decree clearly manifest that they intended, among

other things, carefully to provide to the master's hands the legal means by which he could compel the servant, under pains and chastisements, to remain in his master's service, obey him, and render him his labor. The use of the whip for correcting servants was forever prohibited, and the servant could sue the master for excessive chastisement. When we turn to the legislative acts of this territory, we find that the assembly held in 1851, under the organic act, made a law, very full in its provisions, upon the subject of the relations of masters and servants. It says, "that all contracts celebrated between two or more persons, the one binding himself to labor in certain and determined employments, or all those contracted for, and the other offering his money in determined daily, monthly, or yearly salary, shall be respected and enforced by the civil law according to the agreements made by their own free and voluntary will. Fathers of families are permitted to bind out their children to serve only when their poverty demands it, devoting what they draw on account of their salaries to the support of their own legal families. They can not do so when the amount is more than that which is due them at the end of one year. If the servant does not wish to continue in service for any cause, such as the ill-treatment of the master, and receiving better pay from another, or from any other cause that he may assign, on the payment of the amount yet due, he can not be bound to continue in service; but if he does not pay, he shall be bound. All free men and women not embarrassed by law or other reasonable causes preventing the fulfillment thereof, may celebrate this species of contract. The prefects, alcaldes, and justices of the peace shall indiscriminately authenticate the

books of accounts between masters and servants, according to their jurisdiction. All persons having servants may advance them on account, when they may demand it, two-thirds of their salary in order to support their families." With these there are many other provisions defining the legal consequences which flow from the contract when the parties have entered upon its performance. There is also a section in these words: "When a servant runs off his master may present himself before any authority and take out a warrant of his debt (or as it is in Spanish, in which this law was written, *á sacar testimonio de la deuda*), and with it may proceed in person or otherwise to any part of the Territory and make his claims, which shall be attended to according to law."

* * * * *

In 1846, the political relations of this country were changed from Mexico to the United States. The President of the latter, by virtue of a power well settled as existing in him, assumed the exercise of political authority over this Territory. Through General Kearny he proclaimed laws, established offices, prescribed their functions, and appointed officers to fill and perform the duties of the offices. Their powers and jurisdiction were defined, and he directed the manner these should be exerted. Among the grades of officers were alcaldes. These were officers previously well known in the country. Though called alcaldes, they were, under the Kearny code, substantially justices of the peace. It is a rule of construction applicable to such officers that they have no power beyond that expressly conferred upon them. They derive no general jurisdiction. The acts creating them and clothing them with authority fix and limit the bounds,

beyond which an alcalde's acts are null. In the well-defined powers given him in the code, there was nothing special as to master and servant. The same course of proceeding was left a master to recover his debt from his servant or peon, as in the ordinary way from another debtor, nor was any summary process provided, when the peon had left his master's service, to compel him to return. The mode of summoning a debtor was plainly marked out, as also every succeeding step to be taken in the cause, and the alcaldes were bound to conform thereto. There was no *fuero* left to them to adopt and exert old Mexican processes against one class of debtors when the political system then in force had imposed upon them a new, different, and less harsh system of judicial proceedings. It conformed to the design and spirit of our Government, when she possessed herself of this region and created her courts, to so arrange their practice as to secure the inhabitants against all arbitrary will and judicial despotism.

* * * * *

We think proper, in this place, to notice the further legislation of this Territory upon the subject of master and servant. In 1852 an act provided as follows:

> SECTION 1. All contracts, voluntarily entered into between masters and servants, agreeing and designating the kind of service, the salary, and the time such service shall continue, whether any money shall have been given or received in advance or not, both parties shall be compelled to comply with the contract without power to rescind it, except in the following cases: (1) By mutual consent; (2) for sufficient motive having been given by one party to the other, such as having grievously injured him; (3) if the master keeps the accounts in an am-

biguous manner, so that the servant can not understand them. In these three cases the contract may be rescinded by paying the amount due from one party to the other, as the case may be; but if such motives should not be proven, the contract shall be complied with, and the judge or court of any precinct shall order it to be carried into effect, imposing upon the party failing to comply with the contract, and who shall persevere in doing so, that he indemnify the other party for the injuries resulting therefrom, or which may follow; and all resistance shall be punished by fine or imprisonment, as the gravity or circumstances of the resistance in the case may require, the party, furthermore, being obliged to pay the costs of the trial in the case.

SEC. 2. If a servant shall refuse to comply with a contract, and he should owe any part of the money to the master, and he refuses or can not pay it, the justice of the peace, judge of probate, or district court will compel him to pay *numerato pecunia* the entire principal and legal interest for all the time it may remain unpaid, it being the duty of the judge or court, in case of difficulty, to order the sheriff to contract the services of said person to the highest bidder for the purpose of recovering the debt. The same proceeding shall be had when the master owes the servant any sum of money for services rendered and shall refuse to pay him for the same.

SEC. 3. These offenses committed by servants maltreating their masters or mistresses shall be punished for the same by the justices of the peace or court in which the suit may be brought, with imprisonment for a time demanded by the gravity of the offense.

We see in this section the exertions of the legislature to make more strict and multiply the remedies for the enforcement of these descriptions of contracts. They modify in some respect the act of 1851. By that the servant could leave his master whenever he willed by paying his debt. By this he must abide by and fulfill his agreement according to its terms, whether he owes or does not owe, pays or does not pay. Unless he can get his master's consent to rescind or prove some one of the causes specified to procure a cancellation, he may be prosecuted for a failure, and so may the master, and the servant compelled to a compliance by a fine and imprisonment. It seems strange the act fixed no limits to the power of the magistrate in unmistakable terms and that so much discretion should be conferred upon the court or judge. It appears clear that the legislators were determined that by no means should either of the parties escape the consequences of their own voluntary engagements. Again, the act follows the servant with other measures, more rigid and direct upon his person, if he refuses a compliance with his contract and owes his master any sum and refuses to pay, or is even unable to pay it. It defines how he may be sued for the debt and judgment obtained in the course of a legal proceeding, and, in pursuance of an execution, his services sold by the sheriff to the highest bidder to raise the means to pay the debt. No authority is given the tribunal in this course to adjudicate the servant to the master upon giving the latter judgment for his debt.

We find here no support to that portion of the judgment of the district court which adjudged Mariana to the service of Romero as a peon in default of her or her securities paying the money. The compulsory

process of fine and imprisonment in case the servant refuses to perform his agreement and the extent to which it may be exerted to enforce obedience would seem to furnish ample means to secure him to service. A still further remedy is added in the proceeding. The master may proceed in the ordinary form for the collection of his debt, and in the execution for the sale of the servant's services. The act is in some respects loose and indefinite in its language, yet not so much so that an intelligent court can not find the rule for its guidance.

The great importance which attaches to the subject-matter we have considered, has, among other things, induced a general reference to the laws and enactments which authorize, regulate, and enforce, and to the authorities that illustrate the system of service between masters and servants in this Territory. This system we find to be the peon system of the country, yet in all our searches we see nowhere the term peon in any of the legislation touching the party bound to service. In all instances where we might expect to find it we invariably find servant. In the common use of language the term peon is now used in this country as synonymous with servant. Personal interests to a wide extent have been and still continue interwoven with this system. It is seen to be carfully regulated by the legislature; that the relation of master and servant is formed by mutual contract only; that all free men and women, when no legal impediment exists, may celebrate this species of contracts; that parents can not contract away the services of their children except in certain specified cases; that the parties, in the first place, may agree upon the kind of service, the duration, and the pay; that the service of

the servant becomes bound to his master for an indebtedness founded upon an advancement made in consideration of service; that the servant can not leave his master's service during the time embraced in the contract, unless he proves some one of the two causes to exist mentioned in the statute or shall obtain his master's consent and shall pay what he owes him; that if he shall refuse to serve in conformity with the contract he may be compelled to its fulfillment by the magistrate, with the chastisements of fine and imprisonment; that the master may procure summary proceedings before the judicial officer to enforce compliance; if the servant is a parent, and dies, the children are not compelled to serve in his stead; that the contract may be entered into before judges of probate or justices of the peace, who shall authenticate or attest the same, as they also may accounts between the parties. A peon or servant loses none of his rights as a citizen by contracting with a master to serve him. He is under no political disqualifications; he votes at all elections, if otherwise legally qualified; his servitude does not render him under our laws ineligible to the offices of the precinct, the county, the legislature, or Delegate in Congress.

(2) Description given by H. Yoakum in his "History of Texas," vol. 1, pages 262, 263.

The subject of *peonage*, forming as it does an important item in the domestic relations of the State, and being regulated by statutory provisions, requires some notice. By the decree of the 30th of September, 1828, it was provided that the contract between the master and servant should be set down at the head of the account, in presence of witnesses. Articles furnished

the servant for his labor should be at the market price; and the master was forbidden to credit him for more than a year's wages, except in case of sickness. The master must show his account to the servant on request; and servants could sue their masters before an alcalde. Masters or overseers were authorized to punish idle or disobedient servants by arrest or confinement with shackles for not more than four days; but the use of the whip was forbidden. The master was to furnish the servant with necessary medicines and sustenance during sickness, and charge the same to his account.

The decree of the 4th of April, 1829, modified these rules. It prohibited joint accounts against servants; required masters to retain one-third of servants' wages and apply the same as a credit on their accounts except in case of serious sickness or the absolute nakedness of the servant and his family; also required servants, wishing to be employed, to bring a statement from their former master of the indebtedness to him, and made the new master pay such debt; masters who charged their servants more than the market price for articles were liable to be fined in five times the excess. So much of the former decree as prohibited the whipping of servants was repealed, and masters and overseers were permitted to chastise their servants in a parental manner, but they were responsible for excessive punishment. If the servant left his master's service the alcalde could compel his return and punish him according to the facts When the servant wished to leave his master he could compel the latter to furnish him a statement to show to his new master. Actions of servants against their masters were privileged suits. Masters were not required to bury their servants who died in their debt.

Such were the rules under which a majority of the

Mexican population were held in perpetual servitude. Their wages were so extremely low, and their improvidence was so great, that it was a rare occurrence for one to be out of debt.

(3) Description given by Bancroft in his "History of Mexico," Vol. VI, pages 612-613.

Slavery in the legal sense never prevailed to any extent in Mexico, and it may be said to have ceased in 1810, with the outbreak of the war for independence, both parties offering freedom to gain the adhesion of their bondsmen. Nevertheless a few remained and it was not till 1829 that the Republic formally declared slavery abolished. A more powerful bondage existed, however, in the debtor's law, whereby persons without property were required to render service in payment of debt. It was applied only to Indians, whose careless, stupid, and feast-loving disposition readily induced them to accept the yoke for a small advance, especially on the occasion of marriage. The creditor, usually owner of a plantation, takes care that the small wages agreed upon shall be paid in food and other articles from his own supplies and in such a manner that the bonds increase till the children are within the coils. The debt may be transferred and with it the enslaved. Love for the home region and stubborn conservatism stand in the way of liberation, and so they toil away till death relieves them. Repeated protests were made against this abuse, but it did not suit the interest of those in power to yield, and it was only in November, 1873, that a constitutional amendment abolished peonage. This has not had full effect, as may well be understood, partly because the Indians can be controlled by honor, family ties, and other means; but the conditions are now less oppressive.

(4) Description given in the New International Encyclopedia, Vol. XIII, page 917.

Peonage.—A term loosely used to denote the system of labor formerly prevalent in Spanish America, and especially in Mexico. The system originated in the desire of the Spanish Government to protect the natives from the rapacity of their conquerors. In Mexico the Indians were early given all the privileges of minors, and as such were exempt from compulsory military service, the payment of tithes, aside from a moderate annual tribute, and certain ecclesiastical and legal restrictions, and the royal officials were especially charged with their protection. These privileges and exemptions, however, served equally well as a mark of inferiority, and their natural protectors often took advantage of their helpless political and social condition to force them into virtual slavery. The labor required of the *peones*, as these Indians were called, was of two kinds: The free labor (*obirajes*), a system under which the laborer served by definite contract, with the days of service, tasks, compensation, etc., strictly regulated by the laws of the Indies, and forced labor, as punishment for crime or debt. With the administration of the law in the hands of corrupt officials it was comparatively easy to extend almost indefinitely the number of the second class, and with the requirement that each Indian must perform a certain number of days' work each year the condition of laborers of the first class was far from being one of free contract. During the latter period of the Spanish rule many restrictions were adopted to prevent the Indians from falling into debt, and the conduct of employers was so strictly regulated that the condition of the natives was much better than during the first years of Mexican independence.

The principal evils of the system arose from the strict segregation in separate villages of the Indians, which kept from them any opportunities to advance by more intimate contact with a superior race, and which speedily nullified the first feeble efforts to educate them, and from the feeling of race contempt which their isolated and defenseless condition engendered in their masters. Though in a legal sense the institution itself long since disappeared, the name *peon* is still used to designate the laborer of native or mixed blood, and through his ignorance and credulity many of the worst features of the system are yet fastened upon him. The system as then prevailing in Mexico survived in New Mexico and Arizona a few years after the annexation of the Southwest to the United States, but was removed by national enactment March 2, 1867. Recent revelations have shown that the worst features of the convict-labor system of the South, especially as applied to negro prisoners, closely parallel some of the most flagrant evils of early Spanish-American peonage, and consequently that term has been used, though not with strict accuracy, to designate the condition of these convicts.

(5) **Davis's El Gringo, page 231.**[a]

Another peculiar feature of New Mexico is the system of domestic servitude called peonism, that has existed, and still exists, in all the Spanish-American colonies. It seems to have been an institution of the civil law, and in New Mexico is yet recognized by statute. The only practical difference between it and negro slavery is that the peons are not bought and sold in the market as chattels; but in other respects I

[a] Published 1857. Mr. Davis was for some time United States district attorney for New Mexico.

believe the difference is in favor of the negro. The average of intelligence among the peons is lower than that among the slaves of the southern States. They are not so well cared for, nor do they enjoy so many of the blessings and comforts of domestic life. In truth peonism is but a more charming name for a species of slavery as abject and oppressive as any found upon the American continent.

The statutory law recognizing its existence in the Territory is dignified with the title of "Law regulating contracts between masters and servants." This is all well enough on paper as far as it goes, but the statute is found to be all upon the side of the master. The wages paid is the nominal sum of five dollars per month, out of which the peon has to support himself and family. The act provides, among other things, that if the servant does not wish to continue in the service of the master, he may leave him upon paying all that he owes him; this the poor peon is not able to do, and the consequence is that he and his family remain in servitude all their lives. Among the proprietors in the country, the master generally keeps a store, where the servant is obliged to purchase every article he wants, and thus it is an easy matter to keep him always in debt. The master is required to furnish the peon with goods at the market value, and may advance him two-thirds the amount of his monthly wages. But these provisions, made for the benefit of the peon, are in most instances disregarded, and he is obliged to pay an enormous price for everything he buys, and is allowed to run in debt beyond the amount of his wages in order to prevent him leaving his master. When parents are, as the statute terms it, "driven into a state of slavery," they have the right to bind their

children out as peons, and with this beginning they become slaves for life. When a servant runs away from his master the latter goes before a justice of the peace, or some other civil magistrate, and takes out a "warrant of the debt," which authorizes the arrest of the peon in any part of the Territory. One of the most objectionable features in the system is that the master is not obliged to maintain the peon in sickness or old age. When he becomes too old to work any longer, like an old horse who is turned out to die, he can be cast adrift to provide for himself. These are the leading features of peonism, and, in spite of the new name it bears, the impartial reader will not be able to make anything else out of it than slavery.

APPENDIX B.

DESCRIPTIONS OF THE INSTITUTION OF SLAVERY AND THE SYSTEMS OF REPARTIMIENTOS AND ENCOMIENDAS.

(1) Slavery—Description given by Fiske in his history, "Discovery of America," Vol. II, page 427.

It was those expeditions upon the African coast that introduced slavery into the world in what we may distinguish as its modern form, for in the history of slavery there have been two quite distinct periods. The ancient slave was the prisoner captured in war, the αἰχμάλωτος in the picturesque phrase of the Greeks, which has been somewhat freely rendered as "fruit of the spear." We have observed that in the lower stage of barbarism captives are tortured to death; in the middle stage they are sacrificed to the gods, but as agriculture develops and society becomes settled they are more and more used as slaves; and in the upper stage of barbarism a complete system of slave labor is developed. Doubtless this course of things was attended with some advantages in its day. Ancient slavery was a help in the coalescence of tribes into nations, and to enslave the captive was not quite so cruel as to roast him alive or cut him to pieces. With the advance of civilization ancient slavery slowly grew milder in type. The slaves of a Greek or a Roman were white men like himself, so that the element of race antipathy was absent. By slow degrees European slaves acquired customary rights and privileges, and often became freemen. In general, after making all due

allowances, the face of the Christian Church was resolutely set against slavery, so that later wars and conquests created only such modified forms of it as serfdom and villanage. By the fifteenth century ancient slavery was dead in England and moribund on the continent of Europe, when all at once and most unexpectedly modern slavery came into existence. In this modern system slavery became an extensive branch of commerce. Men of weaker race, despised as heathen, with red or black skins, were hunted and caught by thousands and sold in places where there was a demand for cheap labor. There were features in this modern system as hideous as the worst features of the ancient system. And curiously enough, just as the progress of discovery in Africa had originated this wholesale traffic in men, the discovery of America opened up an immense field where there was soon to be a great and growing demand for cheap labor.

(2) Repartimientos, description of, by Fiske. (History of the Discovery of America, Vol. II, p. 433.)

Slavery, however, sprang up in Hispaniola before anyone could have fully realized the meaning of what was going on. As the Indians were unfriendly and food must be had, while foraging expeditions were apt to end in plunder and bloodshed, Columbus tried to regulate matters by prohibiting such expeditions and in lieu thereof imposing a light tribute or tax upon the entire population of Hispaniola above 14 years of age. As this population was dense, a little from each person meant a good deal in the lump. The tribute might be a small piece of gold or of cotton, and was to be paid four times a year. Every time that an Indian paid this tax, a small brass token, duly stamped, was to be given him to hang about his neck

as a voucher. If there were Indians who felt unable to pay the tribute, they might as an alternative render a certain amount of personal service in helping to plant seeds or tend cattle for the Spaniards.

No doubt these regulations were well meant, and if the two races had been more evenly matched, perhaps they might not so speedily have developed into tyranny. As it was, they were like rules for regulating the depredations of wolves upon sheep. Two years had not elapsed before the alternative of personal service was demanded from whole villages of Indians at once. By 1499 the island had begun to be divided into *repartimientos*, or shares. One or more villages would be ordered, under the direction of their native chiefs, to till the soil for the benefit of some specified Spaniard or partnership of Spaniards; and such a village or villages constituted the *repartimiento* of the person or persons to whom it was assigned. This arrangement put the Indians into a state somewhat resembling that of feudal villanage; and this was as far as things had gone when the administration of Columbus came abruptly to an end.

(3.) **Repartimientos—Described by Bancroft in his "History of the Pacific States," Vol. I, page 262.**

It will be remembered that during his second voyage Columbus made war on the natives of Española, and after sending some as slaves to Spain imposed a tribute on the rest; on some a bell measure of gold, and on others an *arroba* of cotton, every three months. So severe was this tax that many could not meet it, and in 1496 service was accepted in place of tribute. This was the beginning in the New World of the *repartimiento* or, as it shortly afterwards became, the *encomienda*

system, under which the natives of a conquered country were divided among the conquerors, recommended to their care, and made tributary to them.

The theory was that the Indians were the vassals of Spain, no more to be imposed upon than other Spanish subjects. The sovereigns wishing to stimulate discovery, pacification, and settlement, were willing to waive their right to the tribute due the Crown in favor of enterprising and meritorious persons who had taken upon themselves the hardships incident to life in a new country. At first in certain instances, but later to an extent which became general, they settled this tribute upon worthy individuals among the conquerors and colonists and their descendants, on condition that those who thus directly receive a portion of the royal revenue should act the part of royalty to the people placed temporarily in their care. They were to be as a sovereign lord and father, and not as a merciless or unjust taskmaster. They were to teach their wards the arts of civilization, instruct them in the Christian doctrine, watch over and guide and guard them, and never to restrict them in the use of their liberties, nor impose burdens on them, nor in any way to injure or permit injury to befall them. And for this protection they were neither to demand nor receive more than the legal tribute fixed by the royal officers, and always such as the natives could without distress or discomfort pay. What the system was in practice we shall have ample opportunity of judging as we proceed in this history. Suffice it to say here that to the fatherly protection part of their compact the colonists paid little heed, but evaded the law in many ways, and ground the poor savages under their iron heel, while the crown, by ordering and threatening, earnestly but vainly sought

to carry out in good faith and humanity what they deemed a sacred trust.

First, repartimientos of lands were authorized by the sovereigns. This was in 1497 and nothing was then said about the natives. But after dividing the land it was but a step to the dividing of the inhabitants. With the shipment of 600 slaves in 1498, and an offer to their Majesties of as many more as they could find sale for, Columbus wrote, asking permission to enforce the services of the natives until settlement should be fairly begun—say for a year or two; but without waiting for a reply he at once began the practice, which introduced a new feature into repartimientos. Then to all who chose to take them, to Roldam and his followers, to the worst characters on the island, among whom were the late occupants of Spanish prisons, the vilest of human kind, was given absolute dominion over these helpless and innocent creatures. Having paid nothing for them, having no pecuniary interest in them, they had no object in caring whether they were fed or starved, whether they lived or died, for if they died there were more at hand upon the original terms.

See also Vol. V, Id., page 145.

(4.) **Encomiendas—Fiske's description—Discovery of America, Vol. II, page 442.**

The way in which Ovando carried out the order about missionary work was characteristic. As a member of a religious order of knights he was familiar with the practice of *encomienda*, by which groups of novices were assigned to certain preceptors to be disciplined and instructed in the mysteries of the order.

The word *encomienda* means "commandery" or "preceptory," and so it came to be a nice euphemism for a hateful thing. Ovando distributed Indians among the Spaniards in lots of 50 or 100 or 500, with a deed worded thus: "To you, such a one, is given an *encomienda* of so many Indians, and you are to teach them the things of our holy Catholic faith." In practice the last clause was disregarded as a mere formality, and the effect of the deed was simply to consign a parcel of Indians to the tender mercies of some Spaniard to do as he pleased with them. If the system of *repartimientos* was in effect serfdom or villenage, the system of *encomiendas* was unmitigated slavery.

APPENDIX C.

Translations of the various laws of the Territory of New Mexico from 1850 to 1860, relative to peonage or the system of peonage as it then existed in that Territory.

ACT OF 1851.

Be it enacted by the legislative assembly of the Territory of New Mexico, as follows:

SECTION 1. That all contracts celebrated between two or more persons, the one binding himself to labor in certain and determined employments, or all those contracted for, and the other offering his money in determined daily, monthly, or yearly salary, shall be respected and enforced by the civil law, according to the agreements made by their own free and voluntary will, which free will is based upon the obligations of natural rights and consequently gives room to exact the fulfilment of said obligations before the proper tribunals, according to the conditions that are solemnly and mutually stipulated in the contract, the person bound to serve giving his personal labor and the master by paying him his salary, be it in advance or after rendering the service.

SEC. 2. That the amount of salary demanded by the person binding himself or herself to labor, be it male or female, old or young, shall be such as is freely and voluntarily agreed upon by the contracting parties.

SEC. 3. That the things or articles supplied by masters to their servants shall be furnished to them at the market value they may have at the time of supplying them or in lieu thereof the current money.

Sec. 4. Fathers of families are not permitted to bind out their children to serve, contracting excessive debts until they are driven into a state of slavery; and it is further prohibited when the salary or emoluments received from their masters shall be converted in pauperism or spending their time in gambling or other disorders. They are only permitted to do so in the following cases: 1st. When their poverty demands it, devoting what they draw on account of their salaries to the support of their own and legal families. 2d. They can not do so when the amount is more than that which is due them at the end of one year, and even serving more than this time be it remembered that the debt shall not exceed the mentioned amount. 3. If the parent contracting dies, the son shall not be obliged to continue serving.

Sec. 5. That if the servant does not wish to continue in service for any cause, such as the ill treatment of the master, and receiving better pay from another, or from any other cause that he may assign, on paying the amount yet due he can not be bound to continue in service, but if he does not pay the said debt he shall be bound.

Sec. 6. That if the person serving dies who personally bound himself, the family of the person shall not be obliged to pay the balance due by him, but it shall be paid from the effects of the deceased.

Sec. 7. When contracts are made between masters and their servants for the benefit of both, each one shall be liable for damages to any interest arising from any fault committed by them; but if it arises from any unavoidable circumstance, the owner of the property shall be liable for all damages.

Sec. 8. That the persons contracting their services shall fulfill their duties with all punctuality, and shall

use all vigilance, night and day, for the articles under their care, and also on holidays, if required according to the contract and importance of the services rendered, be it in the house, in travelling, in pastures, or other occupations, but if the contract be for merely daily work as laborers, it shall be their duty to labor during the day from sunrise until sunset.

SEC. 9. That the servant who, without permission of his master, shall sell, dilapidate, steal, or in any manner waste his master's property, shall indemnify the same, not only paying the value of the articles, and also the damages, and profits that might accrue from said articles, but shall also be liable to punishment by the authorities according to law and the nature of the guilt and damages incurred.

SEC. 10. That the prefects, alcaldes, and justices of the peace shall indiscriminately authenticate the books of accounts between masters and servants, specifying the terms of the contract.

SEC. 11. That any justice of the peace or judicial authority shall take cognizance of and define all questions between masters and servants according to their jurisdiction.

SEC. 12. When a servant runs off, his master may present himself before any authority and take out a warrant of the debt, and with it may proceed in person or otherwise to any part of the Territory and make his claim, which shall be attended to according to law.

SEC. 13. If any person or persons should trust him any money or other articles, they shall have no right to exact the payment thereof until said servant shall finish paying the amount due to his master, unless the master should voluntarily agree to cover said debt.

SEC. 14. That all male or female servants shall respect their masters as their superior guardians, and all

faults, disobedience, or insubordination committed by them, and attempts made by them to injure their masters, shall be determined and tried according to law.

SEC. 15. Masters who shall chastise their servants or force them to serve beyond the bounds of their contracts and specified in section 8th, shall be tried according to law by the competent authorities, and on being found guilty of the charge shall be fined in a sum not more than twenty-five nor less than one dollar, to be applied to the use of the county wherein the case is tried, recoverable before any alcalde of the county in a summary manner.

SEC. 16. *Proviso:* All free white men and women not embarrassed by law or other reasonable causes preventing the fulfillment thereof may celebrate this species of contract.

SEC. 17. Minors under 21 years of age subject to parental authority cannot celebrate the contracts specified in this act, excepting minors from 14 to 20 years of age not under parental jurisdiction, or that of any other person in the capacity of guardian or overseer; in such case they are considered in the same capacity as the persons referred to in the foregoing section.

SEC. 18. All persons having servants may advance them, on account, when they may demand it, two-thirds of their monthly salary, in order to supply their families.

Translated from the original Spanish.

Approved July 20, 1851.

(Local Laws, Territory of New Mexico, session 1851.)

ACT OF 1853.

An act amendatory of an act regulating contracts between master and servant, approved July 20th, 1851.

SEC. 1. *All contracts voluntarily entered into by master and servant, when rescinded.*

SEC. 2. *When servants refuse to comply with contract.*

SEC. 3. *Offences of servants, how punished.*

Be it enacted by the legislative assembly of the Territory of New Mexico:

SEC. 1. All contracts voluntarily entered into between masters and servants agreeing and designating the kind of service, the salary, and the time such service shall continue, whether any money shall have been given or received in advance or not. both parties shall be compelled to comply with the contract without power to rescind it, except in the following cases: (1) By mutual consent; (2) for sufficient motive having been given by one party to the other, such as having grievously injured him; (3) if the master keeps the accounts in an ambiguous manner, so that the servant can not understand them. In these three cases the contract may be rescinded by paying the amount due from one party to the other, as the case may be; but if such motives should not be proven the contract shall be complied with and the judge or court of any precinct shall order it to be carried into effect, imposing upon the party failing to comply with the contract, and who shall persevere in so doing, that he indemnify the other party for the injuries resulting therefrom, or which may follow, and all resistance shall be punished by fine or imprisonment, as the gravity or circumstances of the resistance the case may require, the party, furthermore, being obliged to pay the costs of the trial in the case.

SEC. 2. If a servant should refuse to comply with the contract, and he should owe any part of the money to the master, and he refuse or cannot pay it, the justice of the peace, judge of probate, or district court will compel him to pay *numerata pecunia* the entire principal and legal interest for all the time it may remain unpaid, it being the duty of the judge or court in case of difficulty to order the sheriff to contract the services of said person to the highest bidder for the purposes of recovering the debt; the same proceeding shall be had when the master owes the servant any sum of money for services rendered and shall refuse to pay him for the same.

SEC. 3. Those offences committed by servants maltreating their masters or mistresses shall be punished for the same by the justices of the peace or court in which the suit may be brought, with imprisonment for a time demanded by the gravity of the offence.

SEC. 4. All acts and parts of acts repugnant to this act shall be and are by these presents repealed.

SEC. 5. This act shall take effect from and after its approval.

Approved January 14th, 1853.

Translation.

(Laws of New Mexico of 1853, vol. 2, page 65.)

ACT OF 1859.

An act amendatory of the law relative to contracts between masters and servants.

Be it enacted by the legislative assembly of the Territory of New Mexico:

SEC. 24. When any servant shall run away from the service of his master, he shall be considered as a fugitive from justice, and in such case it shall be the

duty of all officers of the Territory, judicial or ministerial, on being informed that such persons are within the limits of their jurisdiction, to ascertain whether such person or persons are runaway servants or not, and, if they ascertain that they are, said officers shall immediately arrest them and put them to work at public labor, or hire them out to any person, so that they may be employed with security until their master shall be informed thereof, in order that they may demand them, and to whom they shall immediately be delivered.

SEC. 25. Every person of this Territory, either a contracted servant, according to the law of contracts, or engaged on trips or as shepherds, shall be compelled to serve for the time stipulated for in the contract; and any servant, so contracted, who shall fail to serve, by abandoning his master or property placed under his care, shall be held responsible for all costs and damages which, through his neglect, may result to the owner: *Provided*, That in the same manner in which the servants shall be compelled to comply with this contract, the masters should also be equally obliged in case any servant should fall sick on any trip, to furnish them, at their own expense, the means of cure, and shall not under any circumstances abandon them, but, to the contrary, shall convey them to their homes, where the said servants may be able to procure the means necessary for their subsistence.

SEC. 26. No person shall employ the servant of another without becoming responsible by such act to pay the money due on the first contract; and if they shall furnish him with any money and the servant shall be compelled to return to the service of his first master for the reason that the second did not have or not desire to pay the money due, in such case the second

contractor shall lose his claim, or shall be compelled to wait until the servant shall have paid the money of the first contractor.

SEC. 27. No court of this Territory shall have jurisdiction nor shall take cognizance of any cause for the correction that masters may give their servants for neglect of their duties as servants, for they are considered as domestic servants to their masters, and they should correct their neglects and faults, for as soldiers are punished by their chiefs without the intervention of the civil authority, by reason of the salary they enjoy, an equal right should be granted those persons who pay their money to be served in the protection of their property: *Provided*, That such correction shall not be inflicted in a cruel manner with clubs nor stripes.

SEC. 28. Sections fourteen and fifteen of an act approved July 20, 1851, relative to contracts between masters and servants, are hereby repealed.

SEC. 29. That all acts or parts of acts, laws or parts of laws, in conflict with this act are hereby repealed.

SEC. 30. This act shall be in force and take effect from and after its passage.

Approved January 26th, 1859.

(Compiled Laws of New Mexico, edition 1865, p. 548.)

O

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

SAMUEL M. CLYATT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 235.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

This case came before this court on a certificate from the United States circuit court of appeals for the fifth circuit, and was heard on the 13th and 14th days of December of this present term. During the course of the argument the court ordered that the writ of certiorari previously applied for by the plaintiff in error be issued to bring up the entire record, so that the case is now before the court for final determination either upon the certification or as upon a writ of error.

The Government, in its principal brief, and upon the argument, considered this case as before the court upon the certification *alone*, for the reason that the writ of certiorari to bring up the entire record had not then

been issued. The Government contends that this court may properly answer the questions propounded by the circuit court of appeals without regard to the record in the court below; yet, as this court may be of a different opinion, it becomes necessary to inquire into and determine what disposition should be made of this case if before this court upon a writ of error.

THE FACTS.

The testimony offered by the Government in support of the allegations contained in the indictment discloses substantially the following facts:

It appears that Will Gordon and Moses Ridley, two colored men, were for some time prior to and during a portion of the month of February, 1901, in the employment of James R. Dean, upon his plantation in Levy County, in the State of Florida. These men were working for Mr. Dean as common laborers in making turpentine.

Upon a certain night in the month of February Samuel M. Clyatt, of Waterloo, Ga., in company with a Mr. Taylor and a Mr. Ford, who had come with him from his home in Georgia, and one W. E. Yearty, a deputy sheriff of Levy County, called at the home of Mr. Dean at about 4 o'clock in the morning and informed him that he, Clyatt, had five warrants for some turpentine hands on Dean's place, and gave Mr. Dean their names. Mr. Dean informed Mr. Clyatt that one of the men who was wanted, Hackett by name, was not on his place, but that the other four were. Clyatt

told Dean that these men owed him money, and thereupon Dean paid Clyatt the amount which he claimed to be due from two of the men, and he offered to pay Clyatt his charges against Gordon and Ridley, which, according to Clyatt, amounted to about nineteen dollars for one and eight or nine dollars for the other. Clyatt refused to permit Dean to pay their indebtedness, and thereupon Clyatt and those with him arrested Gordon and Ridley, Clyatt saying that at that time that he wanted to carry them back and make an example of them.

Clyatt and the men who were with him and who participated in making the arrest all came from Georgia, except Yearty, the deputy sheriff, and they were all armed with guns. Clyatt stated that the warrants under which the arrests of Gordon and Ridley were made were for gaming. Deputy Sheriff Yearty handcuffed the two men, Gordon and Ridley, and carried them off, each of them protesting against going. When one of the men refused to put his hands in the shackles Clyatt drew his gun upon him and compelled him to submit to being handcuffed. This all occurred at about daybreak on Mr. Dean's turpentine plantation, several miles from the railroad station at Bronson, Fla. Before leaving the plantation Clyatt settled with Mr. Dean for the amount of his bills against Gordon and Ridley, amounting to between eighteen and twenty dollars for both men. The men were then placed in a buggy with the deputy sheriff and the driver and were driven away, Clyatt, Ford, and Taylor following the

team. One of the colored men thus arrested stated that he did not owe Clyatt any money and did not want to be compelled to go with him, whereupon Clyatt said: "I reckon you will go," and drew his gun on him. "I have had men go off from me owing me, and I always found them and they paid me." (Rec., p. 12.)

It further appears that at the time of the commission of the offense complained of, Clyatt was living at Tifton, in the State of Georgia, and was in some way connected with the firm of Clyatt & Tift, which firm was engaged in the turpentine business. Clyatt had general charge of the management of this business; hired and discharged labor, and superintended generally the business of the firm. Before starting for Florida for the purpose of arresting and returning these men to his service, or the service of Clyatt & Tift, in Georgia, he stated to Mr. Ford that he had some darkies to look after and wanted Ford to go with him to Florida. They reached Bronson, Fla., at about 4 or 5 o'clock in the evening, and there called upon the sheriff of the county, who gave Clyatt a note to his deputy, Yearty. Clyatt, and the men who accompanied him, as stated before, were all armed with guns, and Clyatt had with him handcuffs with which to shackle the prisoners.

After the arrest had taken place, as hereinbefore cited, and when a short distance from the railroad station at Bronson, Ford states in his testimony that the deputy sheriff told Clyatt that his prisoners wanted to

go with him to Georgia instead of being locked up in the Bronson jail. Thereupon Clyatt said: "All right; if they want to go I will carry them." Ford went into the second-class coach, where the men were seated with the handcuffs still on them, and between Rosewood and Gainsville he (Ford) states that he got the key to the cuffs and turned the men loose, but kept watch on them. This party did not arrive at Tifton until some time between 12 and 1 o'clock that night, the colored men—Gordon and Ridley—having been under the control and custody of Clyatt and his men for a period of nearly twenty hours. When they arrived at Tifton Clyatt took the men—Gordon and Ridley—from the train to his house, and the witness (Ford) stated that he never saw Gordon or Ridley after that.

The court asked the witness, Ford, if he did not know that he was going to Florida for hands, and that he went for hands, to which question the witness replied "Yes;" but he immediately said that his going, and his going armed, was because of the expected difficulty with one Davis. (Rec., pp. 15, 16, 17.)

The defendant, Samuel M. Clyatt, introduced no testimony in his behalf upon the trial of this case, whereupon the issues having been submitted to the jury under the instructions from the court, a verdict of guilty was returned.

While the record disclosed no positive and direct testimony with respect to the relationship which had previously existed between Gordon and Ridley on the

one hand and Samuel M. Clyatt on the other, the whole evidence, taken in its entirety, is of such a character as to show, prima facie at least, and in the absence of any testimony to the contrary, that the relation of master and servant had existed between Clyatt and these colored men, and that they had run away from and abandoned their work under Clyatt while still indebted to him, or to the firm of Clyatt & Tift, in various amounts. We submit that the jury was at liberty to consider such facts as having been established, prima facie at least, from all the other evidence in the case.

And, again, while it does not appear from any direct and positive testimony in this case that these men were subsequently held in a condition of peonage or involuntary servitude upon their arrival at Clyatt's home in Tifton, Ga., we respectfully submit that the evidence produced was sufficient to warrant the jury in finding, in the absence of any testimony to the contrary, that such was, in fact, the case, and that these men, Gordon and Ridley, were, as a matter of fact, returned to a condition of involuntary servitude.

ARGUMENT, POINTS, AND AUTHORITIES.

Certainly this court, in considering this case upon the writ of certiorari, will confine its examination to those questions of law presented by the assignments of error in the circuit court of appeals. In view of the apparent incomplete condition of the record, and the further fact that the clerk's certificate (Rec., p. 21) does not recite that the bill of exceptions contains *all the*

evidence offered and received upon the trial of the case in the circuit court, we believe that this court will not consider any of the numerous objections as to the insufficiency of the evidence urged by counsel upon the argument.

In other words, if the evidence contained in the bill of exceptions should for any reason seem to this court to be insufficient to sustain the allegations of the indictment, such fact will be disregarded; first, because the bill of exceptions does not purport to contain *all the evidence*, or in the form in which the same was produced upon the trial; and, second, the bill of exceptions does not show that any objection was made to the sufficiency of the evidence during the progress of the trial upon which an assignment of error could be or is predicated. The first objection as to the sufficiency of the evidence appears in the motions for a new trial and in arrest of judgment, and which, as we shall hereafter point out, could not have properly been considered by the trial court, at least upon the motion in arrest of judgment.

The assignments of error in the circuit court of appeals are six in number. If it can be demonstrated that each and all of these assignments of error are without merit, we submit that the judgment of the circuit court for the northern district of Florida should be affirmed. We will therefore consider each of the assignments of error in its order.

I.

THE COURT ERRED IN OVERRULING THE MOTION OF DEFENDANT FOR THE ARREST OF THE JUDGMENT IN THIS CAUSE UPON THE SEVERAL GROUNDS ALLEGED THEREIN. (First assignment of error, Rec., p. 9.)

The legal effect of this first assignment of error is to charge *that the trial court erred in its refusal to arrest the judgment and set aside the verdict of the jury upon the motion of the defendant's counsel upon the grounds stated in such motion.* If the trial court were right in its refusal to grant the motion, this first assignment of error must fail. The several grounds specifically set forth in the motion for an arrest of judgment are as follows:

> 1st. That the statute under which this indictment is found—to wit, sections 1990 and 5526 of the Revised Statutes of the United States—do not apply to the charges made against this defendant in the indictment or to the evidence in support of the same.
>
> 2nd. That there was no proof whatever of any peonage previous to or subsequent to the finding of the indictment, on Mose Ridley or Will Gordon, inflicted or caused to be inflicted by this defendant, supporting the offense of peonage as charged in this indictment.
>
> 3rd. That the offense of peonage, as defined in the statute, and the punishment therefor, as defined and provided in the sections 1990 and 5526 of the Revised Statutes of the United States, if constitutional, which is denied, was never made applicable to the fact stated and proven in the indictment and such offenses as

were proven are cognizable only in the State courts, no Federal jurisdiction appears in this cause.

4th. No system of peonage is charged or proven to have been in evidence within this jurisdiction.

5th. The proof of an existing custom not charged in the indictment to exist in Levy County, Florida, or in any other locality, could not supply the absence of any proof as to the return of Gordon and Ridley to a condition of involuntary servitude.

Before proceeding to an examination of each of these several grounds upon which it is claimed that the judgment should have been arrested by the trial court, it may be well to ascertain the precise nature of *a motion in arrest of judgment*, and precisely what matters may be properly considered by a trial court in passing upon such a motion.

MOTION IN ARREST OF JUDGMENT.

A motion in arrest of judgment reaches substantial errors which are patent on the record and which vitiate the proceedings, and not errors of the trial court not in the record and which can only appear by a bill of exceptions.

Smith v. *State*, 29 Fla., 408.

McClerkin v. *State*, 20 Fla., 879.

Herron v. *State*, 93 Ga., 554.

Reinhart v. *State*, 29 Ga., 522.

State v. *Kline*, 109 La., 603.

State v. *Murphy*, 72 Me., 433.

Commonwealth v. *Brown*, 150 Mass., 334.

Commonwealth v. *McMahon*, 133 Mass., 394.
People v. *Kelly*, 94 N. Y., 526.
State v. *Conway*, 23 Minn., 291.
King v. *State*, 91 Tenn., 617.
Barnard v. *State*, 88 Wis., 656.
U. S. v. *McKnight*, 112 Fed., 982.
U. S. v. *Barnhart*, 17 Fed., 579.
Bellasis v. *Hester*, 1st Ld. Raym., 280.

This rule, it will be seen, is of almost universal application, and while it may sometimes be difficult to determine in any given case just what are *substantial errors* which appear on the face of the record, it will be sufficient in the discussion of the questions involved upon this motion in arrest of judgment if we can establish the fact that, under the law, *neither the evidence nor the sufficiency of the evidence* can be considered as a part of the record for the purpose of such a motion. That the evidence is no part of the record will, as a general proposition, be admitted.

Carter v. *Bennett*, 15 Howard, 354.
Bond v. *Dustin*, 112 U. S., 604, 608.
Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S., 128, 135.

In the case of Bond *v.* Dustin (*supra*), Mr. Justice Gray, in delivering the opinion of the court, said:

> The attempt to sustain the motion in arrest of judgment, by an argument that the evidence was insufficient to warrant a recovery in this action, fails for the same reason, as well as be-

> cause a motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, *and the evidence is no part of the record for this purpose.* (*Carter* v. *Bennett*, 15 Howard, 354.)

While the cases above cited are from opinions of this court in civil cases, the same rule has been applied in numerous decisions of a criminal nature, as for example:

(*a*) The improper admission or exclusion of evidence, not being a defect apparent in the record, is not ground for a motion in arrest of judgment. The remedy is by prompt objection and exception, and by a motion for a new trial or an appeal or a writ of error.

1 *Chitty Cr. L.*, 661.

McClerkin v. *State*, 20 Fla., 879.

Howard v. *State*, 6 Ind., 444.

State v. *Snow*, 74 Me., 354.

Jacobowsky v. *People*, 6 Hun., 524.

State v. *Jarvis*, 129 N. C., 698.

(*b*) The objection that the verdict is contrary to the evidence or based on insufficient evidence, or that it is contrary to the instructions, can not be urged in arrest of judgment. The remedy of defendant is to move for a new trial.

Bright v. *State*, 90 Ind., 343.

State v. *McCool*, 34 Kans., 617.

State v. *Washington*, 104 La., 443.

State v. *Gerrish*, 78 Me., 20.

Powe v. *State*, 48 N. J. L., 34.

(*c*) The objection that there was no evidence to go to the jury as bearing upon the sufficiency of the evidence is not ground for an arrest of judgment.

State v. *Wilson*, 121 N. C., 650.

Blount v. *State*, 49 Ala., 381.

(*d*) An objection that the prosecution has not proved the venue can not be urged in arrest of judgment.

Walker v. *State*, 35 Ark., 386.

State v. *Wilson*, 66 Mo. App., 540.

But see *Respublica* v. *Ross*, 2 Yeates (Pa.), 1.

Having observed, in a general way, that a motion in arrest of judgment will not permit the trial court to consider an objection which goes to the sufficiency of the evidence, for the reason that the evidence is no part of the record, we are in a position to consider the several grounds included in the motion in arrest of judgment in the case at bar.

In view, however, of certain statements made by Senator Bacon upon the argument of this case, in response to questions from the court, relative to the practice in the State courts of Georgia and, inferentially, in the courts of Florida, we think it only proper at this time to place before this court the laws and decisions of those courts respecting motions in arrest of judgment, and the rules of the Federal courts, especially in the State of Florida, adopting the practice in the State courts.

RULE OF THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA WITH RESPECT TO PROCEEDINGS AND PRACTICE IN CRIMINAL CASES.

> 10. The proceedings and practice in criminal cases of this court shall be substantially the same as that which now prevails in the circuit courts of the State of Florida so far as the same is not inconsistent with or repugnant to the Constitution of the United States or the laws thereof and the rules hereby adopted. (Rules of Practice, United States Circuit and District Courts, Northern District of Florida. Adopted Dec. 22, 1896, p. 5.)

The authority for the adoption of the above rule will be found in section 918 of the Revised Statutes of the United States, which is as follows:

> "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules * * * and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." (Act of Mar. 2, 1793; 1 Stat., 335.)

It is therefore safe to assume that the circuit court for the northern district of Florida, in passing upon this motion in arrest of judgment, was acting under and pursuant to the rule of court adopting the practice of the circuit courts of the State of Florida. A brief examination of the statutes and decisions of the supreme

court of that State will show that the evidence could never be considered as a part of the record upon a motion in arrest of judgment.

FLORIDA STATUTES.

> **Sec. 2936; motions for**—Motions for new trial and in arrest of judgment shall be made in the time and manner prescribed for similar motions in civil cases. (Statutes of Florida, 1892; Cr. Procedure, article 7, p. 884. Motions in arrest of judgment in civil cases, see Florida Statutes, 1892, sections 1181, 1182, and 1183, p. 419.)

THE FLORIDA DECISIONS.

The decisions of the supreme court of Florida uniformly hold that upon a motion in arrest of judgment the evidence is no part of the record, and its insufficiency can not be considered.

McClerkin v. *State* (20 Fla., 879).

> The motion in arrest of judgment was based substantially upon the same grounds upon which the motion for a new trial had been made and overruled. No defect was alleged in the indictment or in any of the subsequent pleadings. "Motions in arrest of judgment arise from *intrinsic* causes, appearing upon the face of the record." (Sedgwick *v.* Dawkins, 18 Fla., 335; Hyer *v.* Vaughn, 18 Fla., 647.)
>
> "A motion in arrest of judgment is not the proper remedy for a wrong verdict. The remedy is not a motion to have the judgment arrested, but a motion to have the verdict set

aside and a new trial granted. Nor is a motion in arrest of judgment the proper remedy for an illegal admission of evidence." (State *v.* Snow, 74 Me., 354.)

The court committed no error in either overruling the motion for a new trial or the motion in arrest of judgment.

Smith v. *State* (29 Fla., 408, 426).

Motions in arrest of judgment reach only such errors as are apparent upon the record, and we can not consider on such motion the sufficiency of the evidence to sustain the verdict of the jury. Bacon *v.* State, 22 Fla., 51; Jordan *v.* State, 22 Fla., 528.

Murray v. *State*, 9 Fla., 246.

Jordan v. *State*, 22 Fla., 528.

Bacon v. *State*, 22 Fla., 51.

The practice and the law of the State of Georgia is, if anything, even in more strict accord with the principles for which we are here contending.

GEORGIA STATUTES.

Sec. 955; exceptions to form and motions in arrest of judgment—All exceptions which go merely to the form of an indictment shall be made before trial, and no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. (The Code of the State of Georgia, 1895; vol. III, p. 249.)

Herron v. *State* (93 Ga., 554).

This was a capital case. The defendant was convicted, and, without making a motion for a new trial, filed a motion in arrest of judgment, on the ground that "on the trial of said case the proof showed that the woman defendant was charged with having killed was named Lula Herron, and not Lula Herring, and there was no proof that the deceased was ever known as Lula Herring, or ever called by that name; that this defect was not waived, but the evidence showing that it was Lula Herron that was murdered was objected to in every instance." Accompanying this motion was a so-called brief of evidence, in the following words: "The testimony of the witnesses showed that the woman defendant was charged with having killed was never known by the name of Lula Herring, but Lula Herron. There was no evidence controverting this fact, it having been proven both by the State's witnesses and defendant's witnesses." Written below was an agreement signed by counsel on both sides, to the effect that "the foregoing is a correct brief of the evidence, so far as relates to the question made by motion in arrest of judgment." This document was approved and ordered filed by the court.

The supreme court of Georgia, in passing upon this question, said:

> If anything is settled law in this State, it is that a motion in arrest of judgment must be based upon a defect, or defects, appearing on

> the face of the record, and not predicated on extrinsic matter not so appearing. Code, sections 3587, 3588. It is unnecessary to cite decisions showing that the law laid down in these sections is applicable to criminal cases.

It is rather difficult to reconcile this decision of the highest court of the State of Georgia with the statements made by counsel in response to certain questions from the court upon the argument of the case at bar. Our recollection is that counsel contended that, according to the practice of the State courts of Georgia, upon a motion in arrest of judgment, certain questions relating to the sufficiency of the evidence, or the entire lack of evidence, upon certain points could be raised. This, however, does not appear to be the law of that State or of any other State so far as we have been able to ascertain from an examination of the cases.

Counsel for the plaintiff in error, in their supplemental brief, on page 54, assert "that a ground in a motion for a new trial or in arrest of judgment *of an entire absence of evidence on a material point* raises purely a question of law," and cite in support of such proposition the case of the *Metropolitan Railroad Co.* v. *Moore* (121 U. S., 558).

That case is by no means an authority in support of such proposition. In the first place, that case relates entirely to a motion for a new trial, which, in very many respects, is essentially different from a motion in arrest of judgment; and, in the second place, it had to

do entirely with the construction of certain sections of the Revised Statutes of the United States relating to the District of Columbia.

Mr. Justice Matthews, who delivered the opinion of the court, in the concluding paragraph of that opinion, used the following language, which shows very clearly that the proposition of law which counsel have asserted is untenable:

> The legal discretion of the supreme court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the supreme court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence.

Counsel for the plaintiff in error further assert that the opinion in *Metropolitan Railroad Co.* v. *Moore*, supra, quotes approvingly from 2 Mackey, 315. We respectfully submit that the case of Stewart *v.* Elliott (2 Mackey, 307, 315) is not approved in *Metropolitan Railroad Co.* v. *Moore*, but substantially overruled. The court said:

> It follows, therefore, that the previous practice of the courts of Maryland and the decisions of the Supreme Court of the United States in

reference to writs of error to and appeals from the former circuit court of this district are not entitled to the weight which was given to them by the supreme court of the District of Columbia in *Stewart* v. *Elliott*, ubi, supra, and in their judgment in this case.

We do not wish to be understood as disputing the proposition *that an entire absence of evidence on a material point raises purely a question of law.* What we do say is that no such question is properly before this court upon the record, and that such a question can not be considered upon *a motion in arrest of judgment.* If a question of this character was raised upon the motion for a new trial, the presumption is that the trial court duly considered it, and the court's action upon such a motion can not be reviewed by this court. It does not appear in the case at bar as it did in *Metropolitan Railroad Co.* v. *Moore*, that the trial court was of the opinion that upon a motion for a new trial it was at liberty to review only certain questions going to the sufficiency of the evidence, from which it follows that that case is not in point.

If, upon the trial of the case at bar, a proper objection had been interposed by the defendant's counsel that there was an entire absence of evidence on a material point, and an exception taken, there would be no question but that the appellate court could properly review the action of the trial court in overruling such objection, but, as we have heretofore stated, the bill of exceptions does not present *a single objection* of this character.

GROUNDS FOR MOTION IN ARREST OF JUDGMENT CONSIDERED.

With this idea that the evidence can not be considered as a part of the record upon a motion in arrest of judgment, it will be a comparatively easy task to examine each of the five grounds set forth in such motion for the purpose of determining whether the trial court erred in refusing to arrest the judgment.

FIRST GROUND.

> That the statute under which this indictment is found, to wit, sections 1990 and 5526 of the Revised Statutes of the United States, do not apply to the charges made against this defendant in the indictment or to the evidence in support of the same. (Rec., p. 6.)

We may eliminate from our consideration that portion of the ground above specified which relates to the evidence if, as we have seen, the trial court would not have been warranted in considering the evidence in support of the indictment upon a motion in arrest of judgment.

Aside from the question of the insufficiency of the evidence, the first ground in the motion for an arrest of judgment alleges that sections 1990 and 5526 of the Revised Statutes of the United States do no not *apply* to the charges made against the defendant in the indictment. In order to determine whether the trial court erred in refusing to arrest the judgment upon this ground, it is necessary to ascertain, if possible, what the trial court understood this language to mean.

We contend that if this language means anything

the idea intended to be conveyed was that the Federal statutes relating to peonage *did not operate upon or apply to the charges made in the indictment, for the reason that it did not appear from the indictment that there existed any law, custom, or usage in the State of Florida sanctioning peonage.* We submit that it was not the intention of counsel for the defendant, and not so understood by the trial court, that this language was intended to raise generally the insufficiency of the indictment. No demurrer had been interposed to the indictment upon the ground that it did not charge a public offense, nor upon any other ground, and neither the motion in arrest of judgment (Rec., p. 6) nor the motion for a new trial (Rec., pp. 5 and 6) contained an objection which by any stretch of the imagination is susceptible of being construed as an objection to the indictment upon the ground of its insufficiency. In support of this contention we invite the court's attention to the several assignments of error in the circuit court of appeals (Rec., p. 9), from which it appears that the sufficiency of the indictment was in no manner specifically or properly presented for the consideration of that court upon the writ of error.

The objection going to the sufficiency of the indictment was for the first time distinctly presented in the third question contained in the certification to this court from the circuit court of appeals, and which, as we have shown on pages 63 to 70 of our former brief, should not be answered under the rules and the prior decisions of this court respecting certifications.

Indeed, counsel for the plaintiff in error practically concede, on page 55 of their supplemental brief, that the only way in which the sufficiency of the indictment is before this honorable court is under the third question contained in the certification, and in support of that proposition they cite and rely upon the authority of *United States* v. *Waddell and others* (112 U. S., 76). In our former brief, on page 69, after citing from and referring to numerous decisions of this court respecting certifications, we point out that *United States* v. *Waddell, supra*, is not in conflict with but an authority upon the proposition that a question certified which goes to the sufficiency of an indictment necessarily involves an answer to several separate and distinct points of law, and will for that reason, under the rules and the decisions of this court, be disregarded.

We respectfully submit in all candor that the question of the sufficiency of the indictment, except possibly so far as the indictment fails to allege a custom or usage sanctioning peonage in the State of Florida, was at no time, so far as appears from the record, raised before the trial court, nor was such question properly presented by the record or the assignments of error in the circuit court of appeals. We are unable to understand why the circuit court of appeals included such question generally in the certification. Possibly this was done upon the authority of the *United States* v. *Waddell, supra, confining and limiting the question* as to the sufficiency of the indictment *to the one specific point as to whether it was necessary for the indictment to*

contain an allegation relative to custom or usage sanctioning peonage. If this were the purpose, we see no objection to answering the third question certified, *thus limited to the question of custom or usage*, and depending, of course, upon the answer which may be given by this court to the second question certified.

SECOND GROUND.

> That there was no proof whatever of any peonage previous to or subsequent to the finding of the indictment on Mose Ridley or Will Gordon inflicted or caused to be inflicted by this defendant, supporting the offense of peonage as charged in this indictment. (Rec., p. 6.)

It will be observed that this objection called upon the court to examine the evidence for the purpose of ascertaining whether "any peonage," whatever that expression may mean, had been inflicted by the defendant upon the parties named in the indictment. This objection clearly goes to the sufficiency of the evidence, and was not a proper ground for the consideration of the trial court upon a motion in arrest of judgment.

Furthermore, it may be admitted that no *peonage* had been inflicted by the defendant upon the parties named in the indictment previous to or subsequent to the finding of the indictment. The statute under which the defendant was convicted does not refer to "peonage," but to a "condition of peonage." We have endeavored in our principal brief to point out the distinction between those two expressions.

THIRD GROUND.

> That the offense of peonage as defined in the statute and the punishment therefor as defined and provided in sections 1990 and 5526 of the Revised Statutes of the United States, if constitutional, which is denied, was never made applicable to the fact stated and proven in the indictment, and such offenses as were proven are cognizable only in the State courts; no Federal jurisdiction appears in this cause. (Rec., p. 6.)

The constitutionality of this law has already been discussed in the Government's brief. The applicability of this statute to the facts alleged in the indictment has been considered under the first ground in the motion for an arrest of judgment. The facts proven were not before the trial court upon this motion, and the jurisdiction of that court over this offense has been sufficiently established in our former brief.

FOURTH GROUND

> No system of peonage is charged or proven to have been in evidence within this jurisdiction. (Rec., p. 6.)

The Government contends that it was entirely immaterial whether a system of peonage existed within the northern district of Florida or not. Section 5526 of the Revised Statutes is operative everywhere within the United States without regard to the existence of a State law, usage, or custom recognizing or sanctioning peonage.

FIFTH GROUND.

> The proof of an existing custom not charged in the indictment to exist in Levy County, Fla., or in any other locality, could not be supplied in the absence of any proof as to the return of Gordon and Ridley to a condition of involuntary servitude. (Rec., p. 6.)

This proposition may be admitted, but it by no follows that it was a sufficient ground for the trial court to grant the motion in arrest of judgment. We are by no means certain that we grasp the idea which counsel intended to convey by the use of this language. But whatever may have been intended as the legal effect of this objection, it is clear that it has to do *alone* with the insufficiency of the evidence, which, as we have shown, was not before the trial court as a part of the record for the purpose of passing upon this motion in arrest of judgment.

For the reasons above given the Government contends that the trial court committed no error in refusing to arrest the judgment upon the grounds included in the motion, from which it follows that the first assignment of error is without merit, and should be disregarded.

II.

THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR A NEW TRIAL UPON EACH AND EVERY GROUND ALLEGED THEREIN. (Second assignment of error, Rec., p. 9.)

It has been held repeatedly that the refusal of a court of the United States to grant a new trial can not be reviewed upon writ of error.

Blitz v. *U. S.* (153 U. S., 308, 312).

Addington v. *U. S.* (165 U. S., 184).

III.

SECTIONS 1990 AND 5526 OF THE REVISED STATUTES, UNDER WHICH THE DEFENDANT WAS TRIED AND CONVICTED, ARE NOT APPLICABLE TO THIS CASE. THERE IS NO ALLEGATION OR PROOF OF THE EXISTENCE OF ANY SYSTEM OF PEONAGE ANYWHERE IN THE STATES OF FLORIDA OR GEORGIA. (Third assignment of error, Rec., p. 9.)

This assignment of error has been sufficiently considered at page 60 of the Government's principal brief, and does not in our judgment require any further discussion.

IV.

THERE IS NO ALLEGATION THAT ANY ACT, LAW, RESOLUTION, ORDERS REGULATIONS OR USAGES, WHICH HAD BEEN BEFORE ESTABLISHED, MAINTAINED OR ENFORCED, IS CHARGED IN THE INDICTMENT OR THAT BY VIRTUE OF ANY OF THESE AN ATTEMPT HAS BEEN MADE IN THIS CASE TO ESTABLISH, MAINTAIN, AND ENFORCE, DIRECTLY OR INDIRECTLY, THE VOLUNTARY OR INVOLUNTARY SERVICE OR LABOR OF ANY PERSON AS PEONS IN LIQUIDATION OF ANY DEBT OR OBLIGATION, OR OTHERWISE, AND THERE IS NO PROOF AGAINST THIS DEFENDANT OF HAVING DONE SO, OR OF HAVING ASSISTED IN THE ARREST OR RETURN OF GORDON AND RIDLEY TO ANY CONDITION OF PEONAGE. (Fourth assignment of error, Rec., p. 9.)

We think that counsel for plaintiff in error will have some difficulty in ascertaining just what is meant by

the language used in this assignment of error. It certainly presents no clear and distinct question of law. If we were to indulge in speculation as to what it means, we should say that the person who framed it intended to make the objection that the indictment does not charge the existence of a law or usage sanctioning peonage in the State of Florida, and that there was no evidence produced upon the trial going to show that the defendant returned Gordon and Ridley to a condition of peonage. If this be what was meant, our answer is that it was unnecessary to charge in the indictment the existence of a law or usage in the State of Florida sanctioning peonage, or a system of peonage, and that the evidence produced upon the trial will be presumed to have been sufficient to show that Gordon and Ridley had been returned to a condition of peonage by Clyatt. Especially is this true when we consider that the bill of exceptions does not purport to contain all the evidence produced by the Government upon the trial.

At no time during the progress of the trial, so far as appears from the bill of exceptions, was any objection made by counsel for the defendant as to the failure upon the part of the Government to prove by sufficient evidence that Clyatt had returned these two colored men to a condition of peonage. The first time this question was raised and called to the attention of the court was upon the motion for a new trial. (Rec., p. 5.)

Where the whole of the evidence is not preserved in the bill of exceptions or some other part of the

record, the appellate court will not review objections based upon the insufficiency of the evidence. The record must expressly show that it contains all the evidence, and the presumption will not be indulged in that the record contains all the evidence. It has even been held that an express statement in the bill of exceptions that it contains all the evidence is not conclusive if it clearly shows that it does not.

Marshall v. *State* (32 Fla., 462).
Griffin v. *State* (116 Ga., 562).
Carmichael v. *State* (111 Ga., 653).
Pace v. *State* (152 Ind., 343).
State v. *Sexauer* (88 Iowa, 722).
State v. *Riley* (37 La. Ann., 5).
State v. *Clarkson* (96 Mo., 364).
State v. *Gardner* (33 Oreg., 149).
Griggs v. *State* (55 Ala., 425).
Tarble v. *People* (111 Ill., 120).
Siple v. *State* (154 Ind., 647).
State v. *French* (96 Iowa, 255).
People v. *Bradner* (44 Hun., 233).
McAllister v. *State* (112 Wis., 496).
Gill v. *State* (43 Ala., 38).
Herzinger v. *State* (70 Md., 278).
State v. *Cary* (4 Wash., 224).
Morrow v. *State* (48 Ind., 432).

V.

THE STATUTES WERE MADE AND INTENDED TO BE APPLIED TO A SYSTEM IN EXISTENCE IN THE TERRITORY OF NEW MEXICO, AND NOT EXTENDED TO ANY STATE WHEREIN THE SYSTEM THEN EXISTING IN NEW MEXICO DID NOT OBTAIN. (Fifth assignment of error, Rec., p. 9.)

This assignment is clearly without merit and has already been sufficiently considered.

VI.

THE COURT ERRED IN ADMITTING ANY PROOF AS TO THE EXISTENCE OF A CUSTOM PREVAILING IN LEVY COUNTY, FLA., TO TAKE LABORERS BY FORCE AND ARMS, OR OTHERWISE, AND RETURN THEM TO LABOR AND SERVICE IN LIQUIDATION OF ANY DEBT OR OBLIGATION. (Sixth assignment of error, Rec., p. 9.)

It is apparent from the record in this case, and the arguments at bar in behalf of the plaintiff in error, that not only the trial judge but the district attorney and counsel for the defendant upon the trial had, in some manner, become imbued with the idea that under the peonage statutes of the United States it was necessary, in order to make such statutes operative, to establish the existence of a custom or a usage sanctioning peonage in the northern district of Florida. While we must confess our inability to appreciate the argument offered in support of such a construction of the law, it is, nevertheless, quite apparent that such an interpretation of the law was favored, at least to a certain extent, by all the parties connected with this prosecution before the circuit court.

In the view which we have taken of the law in this

case, we are forced to admit that the evidence introduced by the Government over the defendant's objection, going to establish the existence of a custom and practice among turpentine men in Georgia and Florida, to take negroes by force and against their will whenever they wanted them, to labor in liquidation of a debt, was entirely immaterial. It does not, however, necessarily follow that the defendant was prejudiced in his substantial rights before the jury by the introduction of such testimony. If it can be demonstrated that the introduction of such testimony was *harmless error*, or, *if prejudicial*, that the error so committed *was subsequently cured by proper instructions from the trial court in its charge to the jury*, this case ought not to be reversed upon this assignment of error.

HARMLESS ERROR.

The admission of evidence which is not material over objection is usually harmless error, unless it appears affirmatively that its admission actually injured the defendant. This is particularly true where there is sufficient competent evidence to sustain a conviction irrespective of that erroneously admitted.

Thompson v. *State* (122 Ala., 12).

Ragland v. *State* (Ark., 70 Southwestern, 1039).

People v. *Johnson* (131 Cal., 511).

Barr v. *People* (30 Colo., 522).

Wallace v. *State* (41 Fla., 547).

Kitchin v. *State* (116 Ga., 847).

Wallace v. *People* (159 Ill., 446).

Keesier v. *State* (154 Ind., 242).
State v. *Shunka* (116 Ia., 206).
State v. *Romain* (44 Kans., 719).
Nelson v. *Commonwealth* (94 Ky., 594).
People v. *Mead* (50 Mich., 228).
State v. *McCartey* (17 Minn., 76).
Browning v. *State* (33 Miss., 47).
State v. *McLane* (159 Mo., 340).
People v. *Coombs* (158 N. Y., 532).
Commonwealth v. *Biddle* (200 Pa. State, 640)
State v. *Martin* (47 S. C., 67).
Turner v. *State* (89 Tenn., 547).
Merritt v. *State* (40 Tex. Cr., 359).
State v. *Taylor* (70 Vt., 1).
Commonwealth v. *Brown* (90 Va., 671).

Upon the proposition that "this is particularly true where there is sufficient competent evidence to sustain a conviction irrespective of that erroneously admitted," see

Haupt v. *State* (108 Ga., 60).
State v. *Tegder* (6 Kans. App., 762).
People v. *Blase* (57 N. Y., App. Div., 585).
Kilpatrick v. *State* (39 Tex. Cr., 10).
Regina v. *Mailloux* (16 New Brunswick, 493).

While this evidence as to custom and usage was in no sense material to the issues involved under the indictment, it will possibly be contended that it affirmatively appears from the record that its admission actually injured the defendant. As we have before observed, the bill of exceptions does not contain, nor purport to contain, all the evidence, and it is impossible to ascertain whether this evidence was received generally or was confined to the particular purpose to

which, under the erroneous conception of both court and counsel, it was intended to apply, namely, to establish the existence of a custom or usage in order to give the court jurisdiction of the subject-matter. We believe that we do not misstate the effect and purpose of this testimony when we say that it was not offered for the purpose of proving the substantive charge contained in the indictment, and was not so understood by the jury, but for the mere purpose of vitalizing and putting the law in operation, which, according to the mistaken views of both court and counsel, was believed to be necessary in order to confer upon the court jurisdiction. If the bill of exceptions were more complete, and the charge of the court to the jury respecting this testimony had been included in the bill of exceptions, we are confident that the present uncertainty respecting the purpose of the admission of this evidence would be dissipated.

IT IS PRESUMED THAT THE COURT PROPERLY INSTRUCTED THE JURY UPON THE LAW, IN THE ABSENCE FROM THE RECORD OF THE ENTIRE CHARGE.

In considering the effect of this evidence of a general custom as affecting the defendant in his substantial rights, it is important to determine, if possible, the purpose for which such evidence was offered and admitted. It is difficult to avoid the conclusion, from an examination of the whole record, that this evidence was offered for the sole and express purpose of giving effect to the operation of the statute, and not with the

idea of having it considered by the jury as tending to establish the substantive offense charged in the indictment. If the trial court, therefore, believed that this evidence was competent and material for such purpose, and it was received for no other purpose, it is only fair to presume that the jury received a proper instruction from the court limiting this evidence to the one purpose for which it was received.

In discussing this point, we are somewhat embarrassed by our view of the law that this evidence was not material for any purpose whatsoever. But assuming, arguendo, that it was material for the purpose for which it was apparently offered, the proposition will hardly be disputed that it was within the province of the trial court, by properly guarded instructions, to confine it to the one fact which it was designed to establish, namely, the existence of a custom with a view to giving the court jurisdiction.

It has been frequently held that although evidence obviously irrelevant be received, the error so committed may be cured by a charge directing that the jury should exclude such evidence from its consideration. (*Pennsylvania Co.* v. *Roy*, 102 U. S., 451, 458.)

The case at bar presents, however, a somewhat different question. The evidence was, in fact, irrelevant and immaterial. The court, however, was obviously proceeding upon the theory that it was relevant and material for *one particular purpose*. The precise question is whether a presumption will be indulged in, in view of the apparent purpose for which the evidence

was offered, that the trial court, in its charge to the jury, confined the evidence, so far as the jury should consider it, to the specific purpose for which it was offered, although such purpose be subsequently found to be without foundation in law.

Reagan v. *Aiken* (138 U. S., 109, 113).

That the law was fully given by the court to the jury we are bound to presume, in the absence from the record of the entire charge; and that it was correctly stated, from the fact that the plaintiffs in error took no exceptions to it. To the same effect see

Blake v. *U. S.* (71 Fed., 286).
Hickam v. *People* (137 Ill., 75).
State v. *Dudoussat* (47 La. Ann., 977).
Commonwealth v. *Glover* (111 Mass., 395).
People v. *Skutt* (96 Mich., 449).
State v. *Clark* (147 Mo., 20).
Bolen v. *State* (26 Ohio State, 371).
State v. *Sheppard* (54 S. C., 178).

If the evidence which we have here under consideration with respect to a custom or practice had been material and relevant for any purpose, its admission by the trial court would certainly not amount to error, unless it were made to appear affirmatively that the trial court, in its charge to the jury, failed to confine its consideration to the purpose for which it was offered. If this proposition be sound, the mere fact that the evidence eventually turns out to be immaterial and irrelevant for the specific purpose for which it was offered ought not, we submit, be regarded as prejudicial error,

unless further it be made to appear affirmatively by the record that the trial court failed to properly charge the jury with respect to such evidence, as it was bound to do under the law.

There is another point which, in our opinion, lends additional support to this contention. If the trial judge had submitted this evidence to the jury upon the theory that they were at liberty to consider this evidence of a custom as going to establish the substantive offense charged, an exception would certainly have been taken by counsel representing the defendant. The fact that no such exception appears in the bill of exceptions lends additional strength to the presumption that the trial court properly limited the application of this evidence to the sole purpose for which it was offered.

And, again, the objection offered to the admission of this evidence seems to have been urged upon the ground *that no such custom was alleged in the indictment*, and for *that reason proof of the same was irrelevant.* From the time of the admission of this evidence until the argument of this case before this court, it does not seem to have occurred to counsel that this evidence of a general custom might have been prejudicial to the rights of the defendant in that the jury may have considered *such evidence* in determining *the question as to whether the crime had been committed by the defendant.* If, during all this time, the possible effect of this evidence has escaped the observation of counsel, it is quite likely, in view of the purpose for which it was offered, that the jury did not consider it in determining the guilt or

innocence of the defendant. Especially is this true when there was ample evidence before the jury to sustain the conviction and absolutely no testimony offered in behalf of the defendant.

THE INDICTMENT.

If the indictment in this case is so fatally defective as to absolutely fail to charge a public offense against the laws of the United States, it may be that this court will consider such question, although raised for the first time on appeal, upon the theory that the trial court was without jurisdiction. (*U. S.* v. *Cruikshank et al.*, 92 U. S., 542, 557; *U. S.* v. *Hess*, 124 U. S., 483.) Our contention is that the indictment here under consideration is not so fatally defective as to show the trial court to have been without jurisdiction, and that the objections to the indictment, now urged for the first time, must be disregarded for the reason that counsel for the accused failed to take advantage of them by demurrer or by a motion in arrest of judgment.

THE EVIDENCE.

Counsel, in their supplemental brief, strenuously urge upon this court consideration of the evidence upon the ground that it is not sufficient to sustain the conviction. In this connection we desire again to invite the attention of this honorable court to the fact that the bill of exceptions apparently does not contain, nor does it purport to contain, all the evidence introduced by the Government upon the trial of this case.

It is difficult for us to appreciate the theory upon which counsel request this court to review the evidence, especially when it be remembered that the bill of exceptions does not contain one single objection to the sufficiency of the evidence produced by the Government. The sole objection contained in the bill of exceptions which in any way relates to the evidence is the one referred to in the sixth assignment of error, bearing upon the question of a custom. We respectfully submit that the question of the sufficiency of the evidence is not properly before this court and for that reason should be disregarded.

QUESTIONS OF LAW INVOLVED.

This case, considered upon the certification and the writ of certiorari, presents substantially but three questions of law. First, the constitutionality of the act of March 2, 1867, known as the peonage statutes of the United States; second, the interpretation which should be given to those statutes. These two questions have been considered and disposed of in the Government's former brief and in the argument at bar upon the certification.

The writ of certiorari, bringing up the entire record, presents the case before this court so that it *may be considered* as here upon a writ of error. In this aspect of the case only one additional question, in our judgment, may properly be considered, viz. Did the trial court err in receiving evidence over the defendant's objection, going to show the existence of a practice or

custom among turpentine men in Georgia and Florida to arrest negroes and return them to work against their will to labor in liquidation of a debt?

CONCLUSION.

In the closing words of the supplemental brief filed by counsel for the plaintiff in error, they protest that "an arraignment of the people of the southern States" is not justified.

If, inadvertently, in our brief or upon the oral argument, words have escaped us which warrant such a description, we regret and withdraw them. Nothing was further from our thoughts than an attempt to arraign the people of any of the States as a body. We were dealing only with those who have offended against the laws of the United States, and believed that we were supporting the best thought and sentiment of the States in which the evil of peonage has begun to appear. This, and other like prosecutions, has not proceeded from an impulse given by any central authority. They have grown out of the convictions of the people of the States who are nearest the evil which they seek to destroy. The verdict in this case, and in other like cases, resulted from the combined action of southern judges, southern prosecuting officers, and southern grand and petit jurors. Their work has been a righteous one, and no satisfaction which has attended us in this case has been so great as the satisfaction of supporting the noble southern men who have rendered this great service to the cause of freedom.

We believe that the decision in this case may properly be confined to the questions contained in the certification, but should this honorable court conclude to consider the case as here upon a writ of error we respectfully submit that the judgment of the circuit court for the northern district of Florida should be affirmed.

WILLIAM H. MOODY,
Attorney-General.

MILTON D. PURDY,
Assistant Attorney-General.

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FILE COPY.

FILED
MAY 16 1903
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

SAMUEL M. GLEATE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. [illegible]

UPON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

SAMUEL M. CLYATT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 659.

UPON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO ADVANCE.

On November 21, 1901, Samuel M. Clyatt was indicted in the United States circuit court for the northern district of Florida for a violation of sections 1990 and 5526 of the Revised Statutes of the United States, known as the Peonage Statutes. The defendant was thereafter tried and convicted upon said indictment, and sentenced to four years' imprisonment in the penitentiary. Afterwards, on March 27, 1902, the defendant applied for and obtained a writ of error from the United States circuit court of appeals for the fifth circuit.

The cause was thereafter argued by counsel for both sides in the circuit court of appeals for the fifth circuit.

Whereupon that court certified three questions to the Supreme Court, as follows:

> 1. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor, to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States?
>
> 2. Is the act of unlawfully and forcibly arresting and returning a person to the custody and control of such person's creditor to be by him held against the will of the debtor, to labor to pay the debt, a violation of the laws of the United States within the meaning of section 5526 of the Revised Statutes of the United States, when, at the time of the arrest and return of such person, there existed in the State to which he was returned to be so held no statute of the State or usage therein creating or sanctioning peonage or a system of peonage?
>
> 3. Do the acts and conduct of the defendant, as charged in the indictment, constitute the offense of holding, arresting, or returning to a condition of peonage, within the purview of section 5526 of the Revised Statutes?

Since the certification of this case to the Supreme Court several of the circuit and district courts in the fifth circuit, in which numerous prosecutions for violations of the peonage statutes are pending, have refused to try any of the cases, but have postponed them to await the decision of the court in this case.

As the case is one of general public importance, the Solicitor-General respectfully moves the court to advance it upon the docket for hearing on an early day during the next term convenient to the court.

Hereto attached will be found a copy of a telegram from opposing counsel practically consenting that the case be advanced. In view of the fact that all pending prosecutions under this statute, nearly fifty in number, have been arrested awaiting the decision in this case, we feel that the case should be heard as soon as the convenience of the court will permit.

HENRY M. HOYT,
Solicitor-General.
MILTON D. PURDY,
Assistant Attorney-General.

EXHIBITS.

A.

THE INDICTMENT.

In the circuit court of the United States for the northern district of Florida, in the fifth judicial circuit.

The grand jurors of the United States of America, empaneled and sworn within and for the district aforesaid, on their oaths present, that one Samuel M. Clyatt, heretofore, to wit: On the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did then and there, unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley returning them the said Will Gordon and Mose Ridley to work to and for Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt and Tift, to be held by them, the said Clyatt and Tift, to work out a debt claimed to be due to them, the said Clyatt and Tift, by the said Will Gordon and Mose Ridley, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

2nd. And the grand jurors aforesaid, on their oaths aforesaid, do further present, that one Samuel M. Clyatt,

heretofore, to wit: On the eleventh day of February, in the year of our Lord, one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did, then and there, unlawfully and knowingly cause and aid to be returned Will Gordon and Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and Mose Ridley, causing and aiding them, the said Will Gordon and Mose Ridley, to be returned to work to and for Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt & Tift, to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

JOHN EAGAN,
United States Attorney.

(Indorsements): A true bill, Edward B. Eppes, foreman.

B.

THE LAW.

SEC. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both.

C.

TELEGRAM FROM HON. W. G. BRANTLEY.

BRUNSWICK, GA., *May 13, 1904.*

UNITED STATES ATTORNEY-GENERAL,

Washington, D. C.:

If your motion to advance the Clyatt case for an early hearing next term does not cut off oral argument and require the case to be submitted on briefs, we have no objection to it. We have no objections to advancing the hearing, but desire to submit oral argument personally. I hope the hearing will not be had before the first Monday in December.

W. G. BRANTLEY.

O

Supreme Court of the United States.

No. 235.—October Term, 1904.

Samuel M. Clyatt *vs.* The United States. } On a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 13, 1905.]

Sections 1990 and 5526, Rev. Stat., read:

"Sec. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"Sec. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

On November 21, 1901, the grand jury returned into the Circuit Court of the United States for the Northern District of Florida an indictment in [redacted] two counts, the first of which is as follows:

"The grand jurors of the United States of America, empaneled and sworn within and for the district aforesaid, on their oaths present, that one Samuel M. Clyatt, heretofore, to wit: on the eleventh day of February, in the year of our Lord one thousand nine hundred and one, in the county of Levy, State of Florida, within the district aforesaid, and within the jurisdiction of this court, did then and there unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them the said Will Gordon and Mose Ridley to work to and for Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt & Tift, to be held, by them, the said Clyatt & Tift, to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The second count differs only in charging that defendant caused and aided in returning Gordon and Ridley. A trial resulted in a verdict of guilty, and thereupon the defendant was sentenced to confinement at hard

labor for four years. The case was taken on appropriate writ to the Court of Appeals for the Fifth Circuit, which certified to this court three questions. Subsequently the entire record was brought here on a writ of certiorari and the case was heard on its merits.

Mr. Justice BREWER delivered the opinion of the Court.

The constitutionality and scope of sections 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in *Jaremillo* v. *Romero*, (1 N. Mex. 190, 194): "One fact existed universally—all were indebted to their masters. This was the cord by which they seemed bound to their master's service." Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, (*Robertson* v. *Baldwin*, 165 U. S. 275,) or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employe of his post of labor in any extreme cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt. Is this legislation within the power of Congress? It may be conceded as a general proposition that the ordinary relations of individual to individual are subject to the control of the States and are not entrusted to the General Government, but the Thirteenth Amendment, adopted as an outcome of the civil war, reads:

"SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SEC. 2. Congress shall have power to enforce this article by appropriate legislation."

This amendment denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the States, but the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude, grants to Congress power to enforce this prohibition by appropriate legislation. The differences between the thirteenth and subsequent amendments have been so fully considered by this court that it is enough to refer to the decisions. In the *Civil Rights Cases*, 109 U. S. 3, 20, 23, Mr. Justice Bradley, delivering the opinion of the court, uses this language:

"This amendment, as well as the fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

* * * * * *

"We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."

In *Plessy* v. *Ferguson*, 163 U. S. 537, 542, Mr. Justice Brown, delivering the opinion of the court, said;

"That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—

a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughter-House cases*, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name."

Other authorities to the same effect might be cited. It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude. This legislation is not limited to the Territories or other parts of the strictly national domain, but is operative in the States and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or of its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or State law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be.

Section 5526 punishes "every person who holds, arrests, returns, or causes to be held, arrested, or returned." Three distinct acts are here mentioned—holding, arresting, returning. The disjunctive "or" indicates the separation between them, and shows that either one may be the subject of indictment and punishment. A party may hold another in a state of peonage without ever having arrested him for that purpose. He may come by inheritance into the possession of an estate in which the peon is held, and he simply continues the condition which was existing before he came into possession. He may also arrest an individual for the purpose of placing him in a condition of peonage, and this whether he be the one to whom the involuntary service is to be rendered or simply employed for the purpose of making the arrest. Or he may, after one has fled from a state of peonage, return him to it, and this whether he himself claims the service or is acting simply as an agent of another to enforce the return.

The indictment charges that the defendant did "unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and the said Mose Ridley, to work to and for Samuel M. Clyatt."

Now a "return" implies the prior existence of some state or condition. Webster defines it "to turn back; to go or come again to the same place or condition." In the Standard Dictionary it is defined "to cause to take again a former position; put, carry, or send back, as to a former place or holder." A technical meaning in the law is thus given in Black's Law Dictionary: "The act of a sheriff, constable, or other ministerial officer, in delivering back to the court a writ, notice, or other paper."

It was essential, therefore, under the charge in this case to show that Gordon and Ridley had been in a condition of peonage, to which, by the act of the defendant, they were returned. We are not at liberty to transform this indictment into one charging that the defendant held them in a condition or state of peonage, or that he arrested them with a view of placing them in such condition or state. The pleader has seen fit to charge a return to a condition of peonage. The defendant had a right to rely upon that as the charge, and to either offer testimony to show that Gordon and Ridley had never been in a condition of peonage or to rest upon the Government's omission of proof of that fact.

We must, therefore, examine the testimony, and the first question that arises is whether the record sufficiently shows that it contains all the testimony. The bill of exceptions, after reciting the empanelling of the jury, proceeds in these words:

"And thereupon the plaintiff, to maintain the issues upon its part, produced and offered as a witness James R. Dean, who, being first duly sworn, did testify as follows."

That recital is followed by what purports to be the testimony of the witness. Then follows in succession the testimony of several witnesses, each being preceded by a statement in form similar to this: "The plaintiff then introduced and offered as a witness, H. S. Sutton, who, being first duly sworn, did testify as follows." At the close of the testimony of the last witness named is this statement:

"Whereupon the plaintiff rests its case.

"Defendant rests—introduces no testimony.

"And the said judge, after charging the jury on the law in the case, submitted the said issues and the evidence so given on the trial, to the jury, and the jury aforesaid then and there gave their verdict for the plaintiff."

It is true there is no affirmative statement in the bill of exceptions that it contains all the testimony, but such omission is not fatal. This question was presented in *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, a civil case, brought to this court on certiorari to the Circuit Court of Appeals, which court had held that the bill of exceptions did not purport to contain all the evidence adduced at the trial, and for that reason did not consider the question whether error was committed in instructing the jury to find for the defendant. Mr. Justice Harlan, delivering the unanimous opinion of the court, disposed of that question in these words (p. 261):

"We are of opinion that the bill of exceptions should be taken as containing all the evidence. It appears that as soon as the jury was sworn to try the issues in the cause 'the complainants, to sustain the issues on their part, offered the following oral and documentary evidence.' Then followed many pages of testimony on the part of the plaintiffs, when this entry appears: 'Whereupon complainants rested.' Immediately after comes this entry: 'Thereupon the defendants, to sustain the issues herein joined on their part, produced the following evidence.' Then follow many pages of evidence given on behalf of the defendant, and the evidence of a witness recalled by the defendant, concluding with this entry: 'Whereupon the further proceedings herein were continued until the 20th day of May, 1896, at 10 o'clock A. M.' Immediately following is this entry: 'Wednesday, May 20th, at 10 o'clock, the further trial of this cause was continued as follows.' The transcript next shows some discussion by counsel as to the exclusion of particular evidence, after which is this entry: 'Thereupon counsel for defendant made a formal motion under the evidence on both sides that the court instruct the jury to return a verdict for the defendant.' Although the bill of exceptions does not state, in words, that it contains all the evidence, the above entries sufficiently show that it does contain all the evidence."

The present case is completely covered by that decision. If in a civil case such recitals in the bill of exceptions are sufficient to show that it contains all the testimony *a fortiori* should this be the rule in a criminal case, and the defendant therein should not be deprived of a full consideration of the question of his guilt by an omission from the bill of the technical recital that it contains all the evidence.

While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet *Wiborg* v. *United States*, 163 U. S. 632,658, justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant.

The testimony discloses that the defendant with another party went to Florida and caused the arrest of Gordon and Ridley on warrants issued by a magistrate in Georgia for larceny, but there can be little doubt that these criminal proceedings were only an excuse for securing the custody of Gordon and Ridley and taking them back to Georgia to work out a debt. At any rate, there was abundant testimony from which the jury could find that to have been the fact. While this is true, there is not a scintilla of testimony to show that Gordon and Ridley were ever theretofore in a condition of peonage. That they were in debt and that they had left Georgia and gone to Florida without paying that debt, does not show that they had been held in a condition of peonage, or were ever at work willingly or unwillingly for their creditor. We have examined the testimony with great care to see if there was anything which would justify a finding of the fact, and can find nothing. No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal

offence, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.

We are constrained, therefore, to order a reversal of the judgment, and remand the case for a new trial.

Mr. Justice McKenna concurs in the judgment.

Mr. Justice Harlan: I concur with my brethren in holding that the statutes in question relating to peonage are valid under the Constitution of the United States. I agree also that the record sufficiently shows that it contains all the evidence introduced at the trial.

But I cannot agree in holding that the trial court erred in not taking the case from the jury. Without going into the details of the evidence, I care only to say that, in my opinion, there was evidence tending to make a case within the statute. The opinion of the court concedes that there was abundant testimony to show that the accused with another went from Georgia to Florida to arrest the two negroes, Gordon and Riley, and take them against their will back to Georgia to work out a debt. And they were taken to Georgia by force. It is conceded that peonage is based upon the indebtedness of the peon to the master. The accused admitted to one of the witnesses that the negroes owed him. In any view, there was no motion or request to direct a verdict for the defendant. The accused made no objection to the submission of the case to the jury, and it is going very far to hold in a case like this, disclosing barbarities of the worst kind against these negroes, that the trial court erred in sending the case to the jury.

True copy.

Test:

Clerk Supreme Court, U. S.